IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioners, Carolyn Bradley, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 29, 1972.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is reprinted in the Appendix hereto *infra*, at pp. 34a-77a. The opinion of the District Court is reported at 53 F.R.D. 28, and appears in the Appendix hereto, *infra* at pp. 1a-33a.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 29, 1972. On February

21, 1973, Mr. Chief Justice Burger ordered that the time for filing a petition for Writ of Certiorari in this case be extended to March 29, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals err in reversing the District Court's award of attorneys' fees to successful plaintiffs in this school desegregation action?

Statutory Provisions Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983, 42 United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 718 of the Emergency School Aid Act of 1972, 86 Stat. 235, provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Statement of the Case

This case was commenced in 1961 to desegregate the public schools of Richmond.

In March, 1964, after extended litigation, the District Court approved a "freedom of choice" plan proposed by the defendant school board. Plaintiffs appealed to the Fourth Circuit Court of Appeals, which affirmed the lower court's finding that freedom of choice satisfied the school board's constitutional obligations. *Bradley* v. *School Board of Richmond, Virginia,* 345 F.2d 310 (1965). Plaintiffs then petitioned this Court for a Writ of Certiorari to consider the constitutionality of the freedom of choice plan. On November 15, 1965, this Court declined to review the Fourth Circuit's decision regarding freedom of choice, but did grant plaintiffs certain additional relief regarding discrimination in the assignment of teaching personnel. 382 U.S. 103.

On March 30, 1966 the District Court approved a freedom of choice plan submitted by the parties. The plan expressly stated that freedom of choice would have to be modified if it did not produce significant results.

On May 27, 1968, this Court ruled that freedom of choice plans were not constitutionally permissible unless they actually brought about a unitary non-racial school system. *Green* v. *County School Board of New Kent County,* 391 U.S. 430.

On March 10, 1970 plaintiffs moved in the District Court for additional relief under *Green.* The defendant school board conceded that the freedom of choice plan under which it had been operating was unconstitutional. After considering a series of alternative and interim plans, the District Court on April 5, 1971, approved a plan for the integration of the Richmond schools involving pupil reassignments and transportation only within the city of Richmond. 325 F. Supp. 828. The defendant school board took no appeal from that decision.[1]

On August 17, 1970, the District Court directed the parties to attempt to reach agreement on the matter of attorneys' fees. When the parties were unable to reach such an agreement, memoranda and evidentiary material were submitted to the court. On May 26, 1971, the District Court awarded plaintiffs attorneys' fees of $43,355.00 as well as costs and expenses of $13,064.65. On appeal the Fourth Circuit, Judge Winter dissenting, reversed the award of attorneys' fees.[2]

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[1] The defendant City Council of Richmond filed a notice of appeal from that decision on April 29, 1971, but on the motion of the City Council that appeal was dismissed on May 13, 1971.

[2] Although the school board's notice of appeal mentions the awards of both attorneys' fees and costs, only the matter of attorneys' fees was briefed, and the Fourth Circuit's decision does not deal with the costs.

This Petition deals solely with the litigation concerning the schools *within* the city of Richmond. The subsequent orders of the District Court regarding Henrico and Chesterfield Counties, which are the subject of cases Nos. 72-549 and 72-550 in this Court, are not involved.

Reasons for Granting the Writ

1. The Decision Below is Inconsistent With the Decisions of This Court Regarding the Responsibility of State Officials to Dismantle Dual School Systems.

This Court has long recognized that in equitable actions such as this the courts have the authority and responsibility to award attorneys' fees to a prevailing plaintiff where such an award is consistent with "fair justice." *Sprague* v. *Ticonic National Bank*, 307 U.S. 164, 164-65 (1939); *Internal Improvement Fund* v. *Greenough*, 105 U.S. 527 (1882). Compare *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 n.4 (1968). Pursuant to this rule, at least five circuits have held that legal fees must be paid in school civil rights cases to plaintiffs who should not have been compelled to resort to litigation to vindicate their clear rights. *McEnteggart* v. *Cataldo*, 451 F.2d 1109 (1st Cir. 1971); *Horton* v. *Lawrence County Board of Education*, 449 F.2d 393 (5th Cir. 1971); *Monroe* v. *Board of Commissioners of City of Jackson*, 453 F.2d 259 (6th Cir.) *cert. denied* 406 U.S. 945 (1972); *Clark* v. *Board of Education of Little Rock School Dist.*, 449 F.2d 493 (8th Cir. 1971); *cert. denied* 405 U.S. 936 (1972); 369 F.2d 661 (8th Cir. 1966); *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972).

In March, 1964, the District Court in this case ordered the school board to implement a freedom of choice plan permitting black and white students to transfer to schools which had earlier been limited to pupils of the other race.

Plaintiffs appealed that order, urging that the school board should be required to go beyond freedom of choice to a plan which would actually result in a unitary school system. The Court of Appeals, however, affirmed the District Court, a majority of the court taking the position that the school board had satisfied its constitutional objections by granting all students "unrestricted freedom of choice as to schools attended," even if the choices resulted in voluntary segregation. 345 F.2d at 316. This Court declined to review that judgment by Writ of Certiorari. 382 U.S. 103 (1965). The appellate proceedings, however, made it clear that the school board's legal responsibilities were not limited to complying with the 1964 freedom of choice plan. This Court directed that the District Court consider the impact of faculty segregation on the adequacy of any desegregation plans, expressly declined to approve the merits of the 1964 plan, and cautioned the defendants that delays in desegregating school systems were no longer tolerable. 382 U.S. at 105. Two of the five Fourth Circuit judges expressly cautioned the school board that the plan should be reviewed and reappraised to see if it was working, and reminded it "that the initiative in achieving desegregation of the public schools must come from the school authorities." 345 F.2d at 322-324.

On March 30, 1966, the District Court ordered into effect a new desegregation plan which went beyond that of 1964 in several respects. The plan provided that it must be evaluated "in terms of results," and that if the steps taken by the school board did not produce "significant results . . . the freedom of choice plan will have to be modified with consideration given to other procedures such as boundary lines in certain areas." Teachers and other staff were to be assigned so that no school was identifiable as intended for students of a particular race. The school

board was forbidden to construct new schools or expand old ones in a way designed to perpetuate or support racial segregation.

Two years later, on May 27, 1968, this Court unanimously condemned freedom of choice plans which did not have the effect, in fact, of dismantling the pre-existing dual school system. *Green* v. *County School Board of New Kent County, Virginia,* 391 U.S. 430. The Court expressly rejected the argument, relied on earlier by the Fourth Circuit in approving the 1964 Richmond plan, that a school board could completely discharge its constitutional obligations by merely "adopting a plan by which every student, regardless of race, may 'freely' choose the school he will attend." 391 U.S. at 437. Those obligations required that each State eliminate "root and branch" the racial identification of its schools which had arisen under State sponsored segregation. 391 U.S. at 435, 438. *Green* stated unequivocally that school boards could not sit idly by maintaining unconstitutional school systems until and unless litigation was commenced against them. 391 U.S. at 438-439.

The message of *Green* can hardly have been missed by the respondent school board in the instant case. The Fourth Circuit panel reversed in *Green* was virtually the same as that which had earlier upheld Richmond's freedom of choice plan, the relevant opinions were written by the same judge, and the 1967 decision reversed by this Court had relied on the earlier decision in this case.[3] New

[3] *Green,* reported at 382 F.2d 338, was a per curiam decision relying on a decision the same day in *Bowman* v. *County School Board of Charles City County,* 382 F.2d 326 (4th Cir. 1967). The Fourth Circuit's earlier decision approving free choice in *Bradley* was cited at 382 F.2d 327, n.2. Judges Haynsworth, Boreman and Bryan were in the majority in both *Bradley* and *Bowman,* joined in *Bowman* by Judge Craven who had been appointed subsequent to the 1965 *Bradley* decision.

Kent County itself is located less than 15 miles from the City of Richmond.

Despite the indisputable illegality of Richmond's freedom of choice plan under *Green*, and despite *Green*'s command that school boards seize the initiative in meeting their constitutional responsibilities, the Richmond school board made no effort to change its system to comply with the law. When the school board had persisted in defiance of *Green* for almost two years, plaintiffs and their counsel were forced once again to assume the burdens of protracted litigation to gain the constitutional rights to which they were clearly entitled.

After plaintiffs moved on March 10, 1970, for additional relief, the District Court's findings showed the school board was not merely in violation of *Green*, but of the 1966 court order as well. The court found that "there was generally little change in the racial composition of the schools from the inception of the freedom of choice plan" to 1970. *Bradley* v. *School Board of City of Richmond, Virginia*, 317 F. Supp. 555, 561 (E.D. Va. 1971). Three of seven high schools were more than 90% black. Of nine middle schools, 3 were over 99% black and 3 were over 90% white. There were 17 all black elementary schools, and another 4 over 99% black, with 15 elementary schools over 90% white. *Bradley* v. *School Board of City of Richmond, Virginia*, 317 F. Supp. at 560; 338 F. Supp. 55, 71-72 (E.D. Va. 1972). Despite the 1966 order, 45 of 66 schools had faculty and staff in excess of 90% white or 90% black. 338 F. Supp. at 72. See also 317 F. Supp. at 560-561. The District Court found, "Under the freedom of choice plan governing Richmond's schools through 1969-70, the faculties of many schools were plainly segregated. This fact, standing alone, contributed to the racial identifiability of schools, and in all probability it also impaired

the process of student body desegregation by personal initiative." *Bradley* v. *School Board of City of Richmond, Virginia*, 325 F. Supp. 828, 838 (E.D. Va. 1971). Regarding school construction, also governed by the 1966 decree, the District Court found: "School construction policy has contributed substantially to the current segregated conditions. Schools have been built and attendance policies maintained so that, even *within* existing school divisions and by comparison with the racial ratios prevailing therein, new or expanded facilities were racially identifiable. The evidence shows that this was purposeful, its immediate and intended result was the prolongation and attempted perpetuation of segregation *within* school divisions." 338 F. Supp. at 86 (emphasis added).

When the school board was brought back into court by plaintiffs in March of 1970, the board could offer no justification for the system it had been operating for nearly two years in defiance of *Green*. On March 12, 1970 the District Court ordered the defendants to state whether they maintained the Richmond schools were being run in accordance with the Constitution. On March 19 the defendants filed a statement that they "had been advised" the school system was not a unitary one. On March 31, after the District Court inquired whether this advice had been accepted, the school board conceded that the school system was operating in a manner contrary to constitutional requirements. 317 F. Supp. at 558.

The District Court based its award of legal fees in large measure on the failure of the school board for almost two years to satisfy its affirmative obligations under *Green*. See pp. 20a-25a; see also 317 F. Supp. at 560. That court reasoned:

> School desegregation decisions illustrate the specific application of a court's equitable discretion to allow

counsel fees to plaintiffs when the evidence shows obstinate noncompliance with the law or imposition by defendants on the judicial process for purposes of harassment or delay in affording rights clearly owing....

A prior appellate opinion in this case states that district courts should properly exercise their power to allow counsel fees only 'when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obstinate obduracy.' *Bradley* v. *School Board of City of Richmond, supra,* 345 F.2d at 321....

The Court has already reviewed the course of litigation. It should be apparent that since 1968 at the latest the School Board was clearly in default of its constitutional duty. When hailed into court, moreover, it first admitted its noncompliance, then put into contest the responsibility for persisting segregation. When liability finally was established, it submitted and insisted on litigating the merits of so-called desegregation plans which could not meet announced judicial guidelines. At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order....

The freedom of choice plan under which Richmond was operating clearly was one such. When this Court filed its opinion of August 17, 1970, confirming the legal invalidity of that plan, the HEW proposal, and the interim plan, it was not propounding new legal doctrine. Because the relevant legal standards were clear it is not unfair to say that the litigation was unnecessary. It achieved, however, substantial delay in the

full desegregation of city schools. Courts are not meant to be the conventional means by which person's rights are afforded. The law favors settlement and voluntary compliance with the law. When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes.

It is no argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense. Pp. 20a-22a.

The Court of Appeals did not disturb the District Court's findings of fact regarding the school board's conduct prior to plaintiffs' 1970 motion for further relief. Nor did the Fourth Circuit question the rule applied by the District Court that legal fees should be allowed where a school board forces private citizens to resort to litigation to vindicate their clear right to a unitary school system. Rather, the appellate court excused the failure of the defendants to dismantle an admittedly illegal dual school system because (1) the school board had received no complaints from plaintiffs or others, and (2) the school board faced "vexing uncertainties" in framing a new plan of desegregation. Pp. 40a-41a. The all too predictable impact of this part of the Fourth Circuit's decision reaches far beyond the problems of legal fees or the boundaries of the city of Richmond.

For almost two decades this Court has admonished school boards to seize the initiative in bringing their systems into compliance with the Constitution. In *Brown II*[4] the Court stated that full implementation of the constitutional principles enunciated in *Brown I*[5] might "require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, *and solving* these problems." 349 U.S. at 299. (emphasis added) In *Cooper* v. *Aaron* the Court explained that under *Brown II* school authorities were "duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." 358 U.S. 1, 7 (1958). In *Green* v. *County School Board of New Kent County* the Court reaffirmed that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary school system in which racial discrimination would be eliminated root and branch. . . . [I]t was to this end that *Brown II* commanded school boards to bend their efforts . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." 391 U.S. at 437-439 (1968); See also *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971). The cautious pace of "all deliberate speed" announced in *Brown I* has long since given way to a call for immediate action. In 1963 and 1964 this Court announced that the context which surrounded the standard of *Brown I* had long since changed. *Goss* v. *Board of Education*, 373 U.S. 683, 689 (1963); *Calhoun* v. *Latimer*, 377 U.S. 263, 264-65 (1964). *Griffin* v. *School Board* announced "[T]he time for mere deliberate speed has run out. . . ." 377 U.S. 218, 234 (1964). Seven years ago, in this very

[4] *Brown* v. *Board of Education of Topeka*, 349 U.S. 294 (1955).

[5] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).

case, the Court declared, "Delays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board of Richmond*, 382 U.S. 103, 105 (1965). The command in *Green* for integration *now* has been reiterated in subsequent decisions. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 13-14 (1971).

This Court's long standing command that school boards seize the initiative in desegregating their schools is now a dead letter in the Fourth Circuit. School authorities in the five states therein are permitted under the decision of the Court of Appeals to continue operating dual school systems unless they are pressed with complaints and know exactly what desegregation plan they should implement. This rule is on its face plainly inconsistent with the opinions of this Court. Few students or parents without the assistance and protection of counsel will brave the community pressures against those who protest segregation. Compare *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 440 n.5 (1968). Virtually any school district will be able to claim that, in view of the complex problems of pupil assignment, transportation, school construction and financing, it, like the Richmond school board, could not foresee the precise plan which would be approved by the courts if litigation were commenced. Compare *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Under the Court of Appeals' decision in this case, it is difficult to imagine any circumstances in which a school board in the Fourth Circuit could be said to have an affirmative obligation to integrate its schools without awaiting litigation.

The sweep of the Fourth Circuit's rule is well illustrated by the facts of this case. It has never been claimed, and no court has ever held, that the *actual* reason the school

board took no action in the face of *Green* in 1968 was that it had no complaints or did not know what to do. The school board never asserted that it spent the 22 months after *Green* trying to formulate a new desegregation plan; once litigation commenced, the board was able to devise its first proposed plan in 41 days, and its second in 27. On the contrary, as late as March, 1970 the school board was still equivocating as to the meaning of *Green,* pp. 2a-3a, and the District Court found that the general attitude of the authorities was that they would take no steps to establish a unitary school system except under court order. P. 21a. Whatever "uncertainties" existed before or after *Swann* were as to the tools which the courts could use when state officials failed to comply with the law. The tools available to school officials themselves are limited only by their imagination and practical considerations; school boards have always been free to adopt any techniques which worked, even though some might be beyond the power of the federal courts to order. *Compare Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971); *McDaniel* v. *Barresi,* 402 U.S. 39 (1971). The goal to be achieved has always been clear—the creation of a unitary school system. Compare *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968). Any uncertainty on the part of the board as to how to achieve a unitary system cannot excuse the board's decision not to try to achieve such a system at all.

When this Court first condemned segregation on the basis of race in *Brown I* some 19 years ago, school authorities in more than half a dozen states were operating dual school systems. Had those authorities stepped forward on their own initiative and begun to integrate their schools, the goals of *Brown I* would have been achieved long ago. Instead, however, many if not most school

boards decided to continue to operate dual school systems until and unless they were sued by black students and their parents. Explaining the circumstances that forced plaintiffs to initiate the instant litigation, the Court of Appeals noted a decade ago:

> Nearly nine years have elapsed since the decisions in the *Brown* v. *Board of Education* cases and since the Supreme Court held racial discrimination in the schools to be unconstitutional. The Richmond school authorities could not possibly have been unaware of the results of litigation involving the school systems of other cities in Virginia, notably Norfolk, Alexandria, Charlottesville and Roanoke. Despite the knowledge which the authorities must have had as to what was happening in other nearby communities, the dual attendance areas and 'feeder' system have undergone no material change. 317 F.2d 429, 437 (4th Cir. 1963)

As Judge Winter noted last year, "Almost all of the burden of litigation has been upon the aggrieved plaintiffs and those non-profit organizations which have provided them with representation." *Brewer* v. *School Board of Norfolk, Virginia,* 456 F.2d 943, 954 (4th Cir. 1972) (concurring opinion) So long as state authorities persist in such conduct, the meager resources available to private litigants will be inadequate to deal with the resulting constitutional violations.

Nearly two decades after *Brown I,* recalcitrant state officials should not be permitted to force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights. *Clark* v. *Board of Education of Little Rock School Dist.,* 499 F.2d 493 (8th Cir. 1971) *cert. denied* 405 U.S. 936 (1972); 369 F.2d 661 (8th Cir. 1966). "The time is *now*

when those who vindicate these civil rights should receive fair and equitable compensation from the sources which have denied them, even in the absence of any showing of 'unreasonable, obdurate obstinacy.'" *Brewer* v. *School Board of Norfolk, Virginia,* 456 F.2d 943, 954 (4th Cir. 1972) (Winter, J., concurring) *cert. denied* 406 U.S. 933 (1972). This Court should grant the Writ sought and reaffirm that the duty to take affirmative action to dismantle dual school systems applies to school officials in the Fourth Circuit as well as to those in the rest of the country. That responsibility should be enforced by requiring that parents and students who are still compelled at this late date to resort to litigation to obtain their well established rights be paid costs and attorneys' fees by the recalcitrant school board.

2. The Decision Below Conflicts With the Decisions of Other Courts of Appeals and of District Courts as to Whether Legal Fees Should Be Awarded to Private Parties Suing to Enforce Important Congressional and Constitutional Policies.

The District Court further grounded its award of attorneys' fees on its conclusion that full and appropriate relief in school desegregation cases under 42 U.S.C. § 1983 should include such awards. Referring to this Court's reasoning in *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968), the District Court held with regard to school desegregation litigation:

> The private lawyer in such a case most accurately may be described as 'a private attorney general.' Whatever the conduct of the defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of nondiscrimination as to a large proportion of

> citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. The fulfillment of constitutional guarantees, when to do so profoundly alters a key social institution and causes reverberations of untraceable extent throughout the community is not a private matter. Pp. 27a-28a.

The District Court noted that, despite the public importance of this type of litigation, it was the sort of enterprise "on which any private individual should shudder to embark" in view of the cost and difficulty of proving a case for injunctive relief, the unlikelihood of damages, and possible hostility toward counsel involved in such unpopular causes. P. 24a. The court felt it particularly inappropriate that officials should be permitted to spend large sums to defend unsuccessfully an unconstitutional school system and then refuse to pay the expenses incurred by the plaintiffs in forcing the State into compliance with the law. P. 32a. The court concluded that it should exercise its broad equitable powers under Section 1983 to adopt in this case the standard set in *Newman* v. *Piggie Park* and award legal fees "unless special circumstances would render such an award unjust." P. 28a.

The Fourth Circuit, reversing, held that, in the absence of an express statutory authorization, no court could award attorneys fees to a private litigant merely because he had successfully sued to effectuate an important Congressional or Constitutional policy. Pp. 51a-60a. The Fourth Circuit relied heavily on the absence of any express authorization of legal fees for school desegregation cases in 42 U.S.C. § 1983 or the 1964 Civil Rights Act, 42 U.S.C. § 2000 c-7, reasoning that such an omission must reflect a purposeful decision by the Congress not to sanction attorney's

fees for enforcing that statute involved. Pp. 54a-55a. Noting that this Court had recently awarded legal fees in the absence of express statutory authority in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the Fourth Circuit held that fees had been awarded in *Mills* solely because the plaintiff-stockholder there had benefitted other stockholders by forcing the accurate disclosure of the relevant terms in a proposed corporate merger. The court rejected the suggestion that the result in *Mills* was based on any effect the litigation might have had in enforcing the public policies contained in the Securities Exchange Act. Pp. 55a-56a. The Court of Appeals noted that any rule sanctioning legal fees for enforcing important public policies might lead to the award of such fees in reapportionment, environmental protection or First Amendment cases. P. 56a. Unwilling to reach such a conclusion, the Fourth Circuit refused to permit the award of attorneys' fees to private litigants merely because they had functioned as private attorneys general.

The rule adopted by the District Court and rejected by the Court of Appeals has been expressly approved by two Courts of Appeals, one three judge court, and six District Courts in eleven different decisions.

In *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (1971), the Fifth Circuit directed the award of legal fees on the ground that the plaintiff there had effectuated important policies by obtaining an injunction against housing discrimination. Quoting this Court's opinion in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968), the court concluded:

> We think the factors relied on in *Piggie Park* in interpreting the provision for awarding attorney's fees apply also to suits under § 1982. The policy

> against discrimination in the sale or rental of property is equally strong. The statute, under present judicial development, depends entirely on private enforcement. Although damages may be available . . . in many cases, there may be no damages or damages difficult to prove. To ensure that individual litigants are willing to act as 'private attorneys general' to effectuate the public purposes of the statute, attorney's fees should be available as under 42 U.S.C. § 3612(c).[6] 444 F.2d at 147-48.

The reasoning in *Lee* was in no way limited to housing discrimination suits under § 1982. The Fifth Circuit subsequently applied the same *Newman* standard for legal fees in an employment discrimination case against the City of Atlanta, stating simply "There is no relevant distinction between a section 1982 suit and a section 1981 suit such as this one." *Cooper* v. *Allen*, 467 F.2d 836, 841 (5th Cir., 1972).[7] A more recent district court decision applying *Lee* and *Cooper* reached the obvious conclusion that "[i]t would be equally difficult to distinguish § 1981 and § 1982 suits from § 1983 suits, such as this one"; adopting the *Newman* standard and finding no special circumstances which would render an award unjust, the court directed the payment of legal fees to the plaintiff in a section 1983 action in order to encourage litigation "to vindicate the federal rights of our citizens." *Jinks* v. *Mays*, 350 F. Supp. 1037, 1038 (N.D. Ga. 1972). In *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1971) a § 1983 reapportionment case, the three judge panel also awarded legal fees on the grounds rejected by the Fourth Circuit in this case:

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[6] This is the statute involved in *Newman*.

[7] Six Fifth Circuit judges participated in *Lee* and *Cooper*. Another Fifth Circuit panel appears to have taken a position inconsistent with *Lee* and *Cooper* in *Johnson* v. *Coombs* (5th Cir., No. 72-3030, opinion dated December 6, 1972).

> In instituting the case *sub judice* plaintiffs have served in the capacity of "private attorneys general" seeking to enforce the rights of the class they represent. See generally *Newman* v. *Piggie Park Enterprises*. . . . If, pursuant to this action, plaintiffs have benefitted their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. See *Mills* v. *Electric Auto-Lite Co*. . . . Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits, *id.*, and to carry out congressional policy. 340 F. Supp. at 694.

Within the Fifth Circuit, legal fees for private attorneys general have also been awarded in *Ford* v. *White*, (S.D. Miss., Civil Action No. 1230(N), opinion dated August 4, 1972), *Wyatt* v. *Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), and *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

The rule applied by the District Court in this case has also been adopted in the First Circuit. Reversing a denial of legal fees in a § 1982 housing discrimination case, that court of appeals cited *Newman* and *Lee* and explained:

> The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at bar illustrates. If a defendant may feel that the cost of litigation, and particularly that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate

> wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.

Knight v. *Auciello*, 453 F.2d 852, 853 (1972).

Legal fees for private attorneys general have recently been sanctioned by district courts in the Eighth and Ninth Circuits. In *La Raza Unida* v. *Volpe*, the court, relying on the Fifth Circuit decision cited above, explained:

> The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney-general" should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential. (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972).

See also *Ross* v. *Goshi*, (D. Hawaii, Civil No. 72-3610, opinion dated December 8, 1972); *Lyle* v. *Teresi*, 327 F. Supp. 683 (D. Minn. 1971).

The Fourth Circuit's decision is openly critical of the Fifth Circuit's opinion in *Lee* v. *Southern Home Sites Corp.*, pp. 55a n.47 and 58a and expressly disapproves the result reached by the three judge court in *Sims* v. *Amos*, p. 53a. In turn, six of the decisions approving legal fees for private attorneys general expressly rely on the very district court decision reversed by the Fourth Circuit in this case, *Bradley* v. *School Board of the City of Richmond, Virginia*, 53 F.R.D. 28 (E.D. Va. 1971). *La Raza Unida* v. *Volpe*, (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972); *Ford* v. *White*, (S.D. Miss., Civil Action

No. 1230(N), opinion dated August 5, 1972); *Ross* v. *Goshi*, (D. Hawaii, Civil No. 72-3610, opinion dated December 8, 1972); *Wyatt* v. *Stickney*, 344 F. Supp. 387, 409 (M.D. Ala. 1972); *NAACP* v. *Allen*, 340 F. Supp. 703, 710 (M.D. Ala. 1972); *Sims* v. *Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972). Although the Fourth Circuit expressly disapproved legal fees for private attorneys general in reapportionment, First Amendment, and environmental protection cases, other courts outside that circuit have awarded such fees in just such cases. *La Raza Unida* v. *Volpe*, (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972 (environmental protection); *Ross* v. *Goshi*, (D. Hawaii, Civil No. 72-3610), opinion dated December 8, 1972) (First Amendment); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972) (reapportionment).

At least five decisions have considered and rejected the Fourth Circuit's argument that the mere absence of an express authorization of legal fees precludes such fees for private attorneys general, at least in civil rights cases. In *Lee* v. *Southern Home Sites Corp.*, the Fifth Circuit distinguished *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967) relied on below, p. 54a, noting that, like section 1983, section 1982 "is not a statute providing detailed remedies, and thus the policy of effectuating Congressional purpose does not militate against an award of attorney's fees." 444 F.2d 143, 145 (1971). In *Ross* v. *Goshi* the court held:

> The statutes which are the basis of relief on the merits do not specifically provide for the awarding of fees, and the general rule is that fees are not recoverable absent an express authorization. The courts have, however, . . . recognized that "whenever there is nothing in a statutory scheme might be interpreted as precluding it, a private attorney should be awarded at-

torneys' fees . . ." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1968), cited by Defendants, is not to the contrary. That case involved an area of the law . . . where Congress has prescribed such "intricate remedies" that the absence of statutory authorization for attorneys' fees must be read as an intent to prohibit such awards. Section 1983, on the other hand, is not a statute providing detailed remedies, and there is no reason to infer any congressional intent to limit the otherwise broad equitable powers of this court. (D. Hawaii, Civil No. 72-3610, opinion dated December 8, 1972).

NAACP v. *Allen* held, "With regard to an award of attorneys' fees, it is of no consequence that 42 U.S.C. § 1983, the statute under which plaintiffs filed this suit, is silent on the availability of such an award." 340 F. Supp. 703, 709-710, n.7 (M.D. Ala. 1972). In *Sims* v. *Amos* the three judge panel similarly concluded "It is of no consequence that the statute under which plaintiffs filed this suit, 42 U.S.C. § 1983, is silent on the availability of attorneys' fee." 340 F. Supp. 691, 695 (M.D. Ala. 1972). The conclusions reached by the Fourth Circuit in this regard are clearly at odds with this Court's recent holding that the mere absence of a provision for attorneys fees does not evince "a purpose to circumscribe the courts' power to grant appropriate remedies." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970).

Although the Fourth Circuit barred legal fees to private attorneys general under § 1983 because that section makes no express reference to such fees, at least six decisions have actually awarded legal fees to private attorneys general suing to enforce that very section. *Ross* v. *Goshi*, (D. Hawaii, Civil No. 72-3610, opinion dated December 8,

1972); *Ford* v. *White*, (S.D. Miss., Civil Action No. 1230(N), opinion dated August 4, 1972); *Jinks* v. *Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972); *Lyle* v. *Teresi*, 327 F. Supp. 683 (D. Minn. 1971).[8]

In awarding legal fees in *Mills* v. *Electric Auto-Lite Co.*, this Court relied, not only on the benefit which the plaintiffs there had conferred on the corporation and stockholders involved, but also on "the stress placed by Congress on the importance of fair and informed corporate suffrage," and the fact that litigation provided "an important means of enforcement of the proxy statute." 396 U.S. 375, 396. Despite this language, the Fourth Circuit held that the result in *Mills* was based on "conferral of benefits, not policy enforcement." P. 55a. Two of the federal courts sanctioning legal fees for private attorneys general have read *Mills* differently, concluding that the language quoted authorizes legal fees for enforcing important public policies. In *Lee* v. *Southern Home Sites*, 444 F.2d 143, 145 (1971), the Fifth Circuit held that the decision in *Mills* "is better understood as resting heavily on its acknowledgment of 'overriding considerations' that private suits are necessary to effectuate congressional policy and that awards of attorney's fees are necessary to encourage private litigants to initiate such suits." The court in *La Raza Unida* v. *Volpe*, concluded that *Mills* authorized legal fees either when a benefit was conferred or important policies effectuated. "*Mills*, then, represents both the defensive and offensive use of

[8] The fact that Congress did not mention legal fees in school desegregation cases when it enacted the 1964 Civil Rights Act cannot limit the broad authority to provide full relief in such cases conferred upon the courts in 1871 with the enactment of 42 U.S.C. §1983. Furthermore, no judicial remedies with respect to school desegregation were created by the 1964 Act. *Compare Newman* v. *Piggie Park Enterprises*, supra.

the Court's equitable powers. Defensive, to prevent unjust enrichment of free riders and offensive, to promote the effective implementation of the Congressional objective of fair and informed corporate suffrage." (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972). The construction of *Mills* in *Lee* and *La Raza Unida* is clearly inconsistent with that stated by the Fourth Circuit.

The Fourth Circuit sought to minimize the obvious conflict between its own decision and those in other circuits by urging "in all the cases where the right to make an award for policy reasons has been stated, it has been stated simply as an alternative ground to a finding of unreasonable obduracy," p. 59a, n.56. This is simply incorrect. In three of the private attorney general cases noted above the court expressly found there was *not* unreasonable obduracy. *La Raza Unida* v. *Volpe*, (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972;[9] *Ford* v. *White*, (S.D. Miss., Civ. No. 1230(N), opinion dated August 5, 1972);[10] *Jinks* v. *Mays*, 350 F. Supp. 1037, 1038 (N.D. Ga. 1972).[11] In four decisions awarding attorneys fees to private litigants enforcing important congressional policies, the courts made no finding either way regarding obduracy by the defendants. *Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight* v. *Auciello*, 453 F.2d 853 (1st Cir. 1972);

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[9] "*La Raza* involved complicated legal questions; by no means were the duties of the state clear, and the court reaffirms its earlier findings that the State Highway Department did not behave in bad faith . . . . [D]efendants' errors and conduct falls short of obdurate behavior."

[10] "The plaintiffs do not base their claim for attorneys' fees on any bad faith or unreasonableness on the part of the defendants. From the outset, the defendants and their attorney worked closely with the attorneys for the plaintiffs as is evidence by the final resolution of this case by a Consent Decree."

[11] "In its written opinion the Fifth Circuit pointed out that the record in this case is devoid of evidence of any bad faith or unlawful motive on the part of defendants."

Ross v. *Goshi,* (D. Hawaii, Civil No. 72-3610, opinion dated December 8, 1972); *Lyle* v. *Teresi,* 327 F. Supp. 683 (D. Minn. 1971). In four of the private attorney general cases the court did find the defendants guilty of unreasonable conduct. In each of these decisions, however, the court carefully stated that it was basing its decision not on this conduct, but on the more general rule announced favoring legal fees for private litigants effectuating public purposes. *Lee* v. *Southern Home Sites Corp.,* 444 F.2d 143, 144 (5th Cir. 1971);[12] *Wyatt* v. *Stickney,* 344 F. Supp. 387, 408 (M.D. Ala. 1972);[13] *NAACP* v. *Allen,* 340 F. Supp. 703, 708 (M.D. Ala. 1972);[14] *Sims* v. *Amos,* 340 F. Supp. 691, 694 (M.D. Ala. 1972).[15]

Plaintiffs would urge that the District Court in this case, and the eleven decisions agreeing with it, correctly conclude that the inherent equitable powers of the courts include the authority to award legal fees to a private litigant who has succeeded in effectuating an important congressional or constitutional policy. The integration of public schools is one of the most vital of those policies, and the burden of such litigation has been borne largely by private parties, *Brewer* v. *School Board of Norfolk, Virginia,* 456 F.2d 943, 954 (4th Cir. 1972) (concurring opinion.) The question of legal fees for private attorneys general in cases such as this is a matter of substantial and growing importance; although the idea was largely

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[12] "We base our holding, however, on a broader ground."

[13] "A second, and more appropriate, justification for the Court's award. . . ."

[14] "This court, however, feels that the attorneys' fee award should be premised on a broader basis than defendants' bad faith."

[15] "Nevertheless, a finding of bad faith is not always a prerequisite to the taxing of attorneys' fees against defendants, and in this case, despite the availability of that ground, the Court has decided to base its award on far broader considerations of equity."

undeveloped prior to this Court's decision in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968), the propriety of awarding such fees was decided in three lower court cases in 1971 and 10 in 1972. The problem is not limited to legal fees in school cases—attorneys' fees have been awarded to private attorneys general in cases involving reapportionment,[16] free speech,[17] environmental protection,[18] housing relocation,[19] jury discrimination,[20] discrimination in public employment,[21] discrimination in the sale or rental of housing,[22] conditions in institutions for the retarded and mentally ill,[23] adequacy of medical facilities in prisons,[24] and discriminatory prosecution and police harassment.[25] Although attorneys' fees for private attorneys general are forbidden in the Fourth Circuit absent an express statutory authorization, such fees are actually being awarded in the First, Fifth, Eighth and Ninth Circuits. Only this Court can establish a uniform Federal rule regarding this question.

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[16] *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972).

[17] *Ross* v. *Goshi* (D. Hawaii, Civ. No. 72-3610, opinion dated December 8, 1972).

[18] *La Raza Unida* v. *Volpe* (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972).

[19] *Id.*

[20] *Ford* v. *White* (S.D. Miss., No. Civ. 1230(N), opinion dated August 4, 1972).

[21] *Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Jinks* v. *Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972).

[22] *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Knight* v. *Auciello*, 453 F.2d 853 (1st Cir. 1972).

[23] *Wyatt* v. *Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972).

[24] *Newman* v. *Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972).

[25] *Lyle* v. *Teresi*, 327 F. Supp. 683 (D. Minn. 1971).

3. The Decision Below Conflicts With the Decisions of This Court and Other Courts of Appeals as to When Legal Fees Should Be Awarded to Plaintiffs Who Have Secured Relief Benefitting a Class.

For almost a century this Court has sanctioned the award of attorneys' fees to a plaintiff who has successfully maintained a suit that benefits a group of others in the same manner as himself. *Trustees* v. *Greenough*, 105 U.S. 527, 531-537 (1882). The foundation for this practice is the original authority of the chancellor to do equity in a particular situation. *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161 (1939). To allow the others to obtain full benefit from the plaintiffs' efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiffs' expense. In its most recent restatements of this doctrine, this Court held that legal fees should be awarded even though the litigation had not created a fund from which those expenses could be deducted. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970); *Sprague* v. *Ticonic Nat. Bank*, 301 U.S. 161, 166 (1939).

In the instant litigation plaintiffs seek legal fees *inter alia* on the ground that their successful effort to integrate the Richmond schools benefitted a large group other than themselves. The beneficiaries include not only the many thousands of black public school students spared the consequences of an inherently unequal separate education, but also the white students involved . Compare *Trafficante* v. *Metropolitan Life Insurance Company*, 41 U.S. Law Week 4071 (1972). The most appropriate device for sharing the cost of plaintiffs' successful litigation among all the student beneficiaries is to impose that cost on the school board, since the board's funds are raised from the entire population and are to be used for the benefit of

Richmond's school children. Compare *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 393-94 (1970).

While this appeal was pending the Fourth Circuit announced its interpretation of *Mills, Sprague* and *Greenough* in *Brewer* v. *School Board of City of Norfolk, Virginia,* 456 F.2d 943, *cert. denied* 406 U.S. 933 (1972). In *Brewer* the plaintiffs obtained in the district court a substantial restructuring of Norfolk's school system, including the pairing and clustering of schools and the reassignment of large numbers of students. On appeal the Fourth Circuit also directed, at plaintiff's behest, that the school board furnish free transportation to students who were not within walking distance of their new schools. 456 F.2d 943, 946-948. The Fourth Circuit awarded attorneys fees for plaintiffs' efforts in obtaining free transportation, on the ground that the benefit involved was "pecuniary" in nature. 456 F.2d 943, 951-52. Since the benefits of an integrated education also obtained by plaintiffs for the class were not deemed pecuniary, legal fees for this aspect of the litigation were denied.[26]

In the instant case the benefit claimed to have been conferred by plaintiffs on the class of students was precisely the type of benefit rejected as not pecuniary in *Brewer*—an integrated education. Accordingly, the Fourth Circuit held that, under *Brewer*, legal fees could only be obtained in this case on a showing that the school officials had shown unreasonable, obdurate obstinacy. Pp. 35a and 54a.

The requirement of *Brewer*, applied in this case, that legal fees for benefitting a class only be awarded for bene-

[26] On remand the district court awarded attorneys fees for legal services in securing free transportation, but awarded no fees for the far more extensive services which resulted in Norfolk's general desegregation plan. Unreported opinion of Judge MacKenzie dated January 22, 1973.

fits of a pecuniary nature, is completely at odds with the decisions of this Court and lower federal courts. In *Mills* v. *Electric Auto-Lite Co.* this Court expressly reputed any such requirement that the benefit be pecuniary:

> The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into court as a prerequisite to the court's power to order reimbursement of expenses. . . . [A]n increasing number of lower courts have acknowledged that a corporation may receive a 'substantial benefit' from a derivative suit, *regardless of whether the benefit is pecuniary in nature*. . . . [I]t may be impossible to assign monetary value to the benefit. Nevertheless . . . petitioners have rendered a substantial service to the corporation and its shareholders. 396 U.S. at 392, 395-396. (Emphasis added)

Taking this unambiguous language to mean what it said, the Court of Appeals for the District of Columbia recently awarded legal fees in another case on the ground, *inter alia*, that "[T]he Supreme Court made clear in *Mills* that the judicial power to award counsel fees does not depend upon . . . whether the benefit conferred is pecuniary in nature." *Yablonski* v. *United Mine Workers of America*, 466 F.2d 424, 431 n.10 (1972). See also *La Raza Unida* v. *Volpe*, (N.D. Cal., October 19, 1972, No. C-71-1166 RFP opinion dated October 19, 1972) ("*Mills* extended the scope of the common-fund justification for the awarding of fees

by holding that no *pecuniary benefit need be demonstrated.*")

Relying on this Court's opinion in *Mills,* Federal courts have repeatedly awarded legal fees under circumstances not involving the "pecuniary benefit" required by the Fourth Circuit. In *Yablonski* v. *United Mine Workers of America,* attorneys' fees were awarded for four successful lawsuits aimed at guaranteeing free and fair elections within a labor union. 466 F.2d 424 (D.C. Cir., 1972). Legal fees have also been awarded in litigation regarding constitutionally inadequate medical facilities for prisoners and discrimination in public housing, *Hammond* v. *Housing Authority,* 328 F. Supp. 586 (D. Ore. 1971); *Newman* v. *State of Alabama,* 349 F. Supp. 278 (M.D. Ala. 1972). See also *Jinks* v. *Mays,* 350 F. Supp. 1037 (N.D. Ga. 1972); *Callahan* v. *Wallace,* 466 F.2d 59 (5th Cir. 1972); *Sincock* v. *Obara,* 320 F. Supp. 1098 (D.Del. 1970). Decisions awarding legal fees to plaintiffs who both effectuate public policies and benefit others have done so for such non-pecuniary benefits as legislative reapportionment, *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala. 1972) and ending jury discrimination, *Ford* v. *White,* (S.D. Miss., Civ. Act. No. 1230 (N); opinion dated August 4, 1972).

The Fourth Circuit's disagreement with *Mills* and its progeny is thinly veiled at best. *Mills* itself is characterized as "an uneasy half-way house" between "the traditional position" and "universal fee shifting from the successful party." P. 59a. *Lee* is described as sanctioning "excessive judicial discretion that may emasculate the general rule against fee awards and inject more unpredictability into the judicial process." P. 58a. The Court of Appeals expressly opposed a rule allowing awards in reapportionment cases, while noting that just such an award had been made in *Sims.* P. 57a. The very District Court decision reversed

by the Fourth Circuit in this case, awarding legal fees to the instant plaintiffs, was cited with approval by two of the federal courts approving legal fees for non-pecuniary benefits under *Mills. Ford* v. *White,* (S.D. Miss., No. Civ. 1230 (N), opinion dated August 4, 1972)); *Sims* v. *Amos,* 340 F. Supp. 691, 694 (M.D. Ala. 1972).

Only this Court can end the confusion and inconsistency which plainly exists as to whether, particularly in civil rights cases, legal fees can be awarded to plaintiffs who benefit others in a non-pecuniary manner.

4. The Decision Below Conflicts With the Decision of This Court as to When Federal Statutes Must be Applied Retroactively.

While the legal fees portion of this litigation was pending on appeal, Congress enacted new legislation mandating the award of legal fees in school desegregation cases. Section 718 of the Emergency School Aid Act of 1972, which became effective on July 1, 1972, provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Plaintiffs brought this statute to the attention of the Court of Appeals and urged that it entitled them to legal fees in the instant case.

After an *en banc* hearing the Fourth Circuit refused to apply section 718 to legal services rendered prior to June 30, 1972. P. 61a. In a companion case, *Thompson* v. *School Board of the City of Newport News,* the Court explained tersely, and without citation, that this result was compelled by "the principle that legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute applied in that manner." (No. 71-2032, opinion dated November 29, 1972). Pp. 78a-81a.

The origin of the "principle" relied on by the Court of Appeals is not explained. The Fourth Circuit's principle appears to be the very same principle announced by the Supreme Court of North Carolina five years earlier: "The First rule of construction is that legislation [and directives] must be considered as addressed to the future, not the past. . . . [A] retrospective operation will not be given to a statute [or directive] which interferes with antecedent rights unless such be 'the unequivocal and inflexible import of its terms, and the manifest intention of the legislature.'" [27]

The principle of the North Carolina Supreme Court, apparently revived by the Fourth Circuit, was unanimously rejected by this Court on certiorari. The general rule, the Court stated in *Thorpe* v. *Housing Authority of Durham,* "is that an appellate court must apply the law in effect at the time it renders its decision. . . . 'A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law' . . .

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[27] *Housing Authority of City of Durham* v. *Thorpe,* 271 N.C. 468, 470, 157 S.E. 2d 147, 149 (1967).

'[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . This same reasoning has been applied where the change was constitutional, statutory, or judicial." 393 U.S. 268, 281-282 (1969). The Fourth Circuit did not argue that this case involves any of the acknowledged exceptions to the rule in *Thorpe*. See 393 U.S. 268, 282. The decision of the Fourth Circuit announced in this case and *Thompson*, limiting section 718 to legal services rendered after June 30, 1972, is plainly inconsistent with this Court's decision in *Thorpe* and must be reversed. See also *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 418-420 (1971).

The Fourth Circuit further grounded its refusal to apply § 718 to this case on the fact that no final order regarding the merits of this case was pending on appeal on June 30, 1972. The reason why the Court of Appeals thought this fact significant is unclear. Judge Winter, dissenting, reads the majority as holding that legal fees can only be awarded under § 718 if that award is made simultaneous with the decision on the merits. Pp. 75a-77a.[28] Such a rule makes no sense whatever, and can only serve to frustrate the congressional purposes behind the new statute. See p. 76a. It is possible, alternatively, that the Fourth Circuit was announcing a new rule on retroactivity, requiring not only the question of legal fees but also the merits of the desegregation litigation to be pending on appeal when the new statute was enacted. Plaintiffs conceive of no warrant for such a rule. *Thorpe* clearly requires that new laws be applied to pending controversies regardless of whether other controversies between the same parties have been finally decided.

[28] In fact the question of legal fees was pending before the District Court when the plan of April 5, 1971, was approved.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

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APPENDIX

Memorandum Opinion of District Court in *Bradley* Action

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

CIVIL ACTION NO. 3353-R

CAROLYN BRADLEY, etc., *et al.*,

v.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, *et al.*

This class action, brought ten years ago in an effort to end racial discrimination in the operation of public schools in Richmond, Virginia, is before the Court on a motion for attorneys' fees. An appropriate ruling on the pending motion requires an abridged review of events since March of 1970.

On March 10, 1970, a motion for further relief was filed in this case, and after extensive hearings this Court ordered into effect an interim desegregation plan prepared by the School Board for the school year 1970-71, *Bradley* v. *School Board of City of Richmond*, 317 F. Supp. 555 (E.D. Va. 1970), and later, a plan for 1971-72, *Id.*, 325 F. Supp. 828 (E.D. Va. April 5, 1971). Appended to the motion for further relief was an application for an award of reasonable attorneys' fees, to be paid by the City School Board. In light of the defendants' conduct before and dur-

ing litigation, and by reason of the unique character of school desegregation suits, justice requires that fees should be awarded.

This case lay dormant from 1966 until the motion of March, 1970. During that period the city schools were operated under a free choice system of pupil assignment. The plan was approved by the court of appeals, *Bradley* v. *School Board of City of Richmond*, 315 F.2d 310 (4th Cir. 1965), but the case was remanded for further hearings on faculty assignments by the Supreme Court, *Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103 (1965). After some further district court proceedings the case lay idle until 1970.

When the suit was reactivated the defendants were directed, pursuant to this Court's usual practice in school desegregation cases, to state on the record whether they contended that the schools were then operating as a unitary system, and, if not, what period of time would be required to formulate a constitutional plan. In open court, albeit reluctantly, the defendants admitted that the Constitution was not being complied with;[1] they were ordered on April 1, 1970, to submit a unitary plan on or before May 11, 1970. Hearings were set for June, and the parties were admon-

[1] Of course, it scarcely excuses the School Board's continued operation under an invalid plan that they were under an outstanding court order to do so. Legal requirements change; what is consistent, moreover, with a pace of deliberate speed at one time should not be confused with the ultimate goal. The school system was in violation of outstanding authoritative decisions, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 431 F.2d 138, 141 (4th Cir. 1970), rev'd. in part, 402 U.S. 1 (April 20, 1971). To await the plaintiffs' initiation of legal action may have seemed a wise strategic choice, but it cannot be equated with the fulfillment of the affirmative duty to desegregate.

ished as to the necessity of implementing a unitary plan in the fall of 1970.

The Court will not restate its findings of fact and conclusions of law which resulted from the hearings of the summer of 1970; these are adequately covered in the reported decision. A few points relevant to the present motion should be stressed.

Although the School Board had stated, as noted, that the free choice system failed to comply with the Constitution, producing as it did segregated schools, they declined to admit during the June hearings that this segregation was attributable to the force of law (transcript, hearing of June 20, 1970, at 322). Hearings which the Court had hoped would be confined to the effectiveness of a plan of desegregation consequntly were expanded; the plaintiffs were put to the time and expense of demonstrating that governmental action lay behind the segregated school attendance prevailing in Richmond. Public and private discrimination were shown to lie behind the residential segregation patterns over which the School Board proposed to draw neighborhood school zone lines. Evidence on choice of school and public housing sites, restrictive covenants in deeds, discrimination in federal mortgage insurance opportunities, housing segregation ordinances, and continued practice of private discrimination was presented, most of it without cross-examination or serious attempt at refutation. All of this proof was clearly relevant, not only under *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 431 F.2d at 141, decided just prior to the hearings, but also under *Brewer* v. *School Board of City of Norfolk*, 397 F.2d 37, 41 (4th Cir. 1968).

At the same hearings the School Board presented a desegregation proposal developed by a team from the Depart-

ment of Health, Education and Welfare that was obviously unacceptable under law then current. It is hard to see how the Board could have contended otherwise, for its proposals achieved very little desegregation beyond what prevailed under the free choice system, which it had rightly declined to defend. These hearings were held more than two years after *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) was handed down. Since that time it has been clear that compliance with the Constitution is not measured by the formal racial neutrality of a pupil assignment plan but rather by its effectiveness in extinguishing the public policy of segregation. Freedom of choice had left three of seven high schools all black and one nearly all white. It left five junior high schools out of eleven all black or nearly so and two nearly all white. Of forty-four elementary schools, twenty-two were substantially all black and eight almost all white, with several others containing a significant but still grossly disproportionate Negro enrollment. The School Board's desegregation proposal—the HEW plan—would have placed small minorities of the opposite race in the three formerly black high schools and would have left the white high school unchanged. Three junior high schools would have remained as obviously black facilities and there would have been two clearly white; and five almost 100% white and fifteen nearly all black elementary schools. Many other elementary schools could not strictly have been called all black or all white, but departed substantially from the systemwide ratio and would be readily identifiable racially.[2]

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[2] A full tabulation of the results projected under the HEW plan is given in *Bradley* v. *School Board of the City of Richmond*, *supra*, 317 F. Supp. at 564-65.

Not only did the results of the School Board proposal condemn it, but also it failed to pass legal muster because those who prepared it were limited in their efforts further to desegregate by self-imposed restrictions on available techniques. Consideration of residential segregation in drawing zone lines was omitted, except that it was decided at a late date to pair a few schools; transportation was not seriously considered as a desegregation tool, and in general, astonishingly, race was not taken into account in the formulation of the plan. Since 1966 it has been plain that school boards in this circuit may consider race in preparing zone plans. *Wanner* v. *County School Board of Arlington County,* 357 F.2d 452 (4th Cir. 1966). To bar this key factor from discussion would render impossible almost the first step in the Board's task of disestablishing the dual system. For failure to address itself to the legal duty imposed upon it by *Green,* that of taking affirmative action to desegregate, the plan was manifestly invalid. Furthermore, *Swann* held that busing and satellite zoning were legitimate integration techniques. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 431 F.2d at 145-46. A plan that failed even to experiment with these legitimate tools and yet left such substantial segregation should never have been proposed to the Court.

The School Board was directed to submit a further plan within a month's time, and hearings were held on the second proposal. At the conclusion of the June proceeding the Court had specifically called the parties' attention to recent appellate rulings fixing the extent of their obligation: *Brewer* v. *School Board of City of Norfolk,* 434 F.2d 408 (4th Cir.) *cert. denied* 399 U.S. 929 (1970); *Green* v. *School Board of City of Roanoke,* 428 F.2d 811 (4th Cir. 1970);

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United States v. *School Board of Franklin City*, 428 F.2d 373 (4th Cir. 1970); *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 431 F.2d. Under these precedents the School Board's second plan also failed to establish a unitary school system. Its deficiencies are fully treated in the Court's earlier opinion;[3] the most glaring inadequacy is the large proportion of elementary students placed in substantially segregated schools. The Fourth Circuit in *Swann* rejected an elementary plan which left over half the black elementary students in 86% to 100% black schools and about half the whites in 86% to 100% white schools. In the face of that ruling the School Board proposed a plan under which 8,814 of 14,943 black elementary pupils would be in twelve elementary schools over 90% black, and 4,621 of 10,296 white elementary pupils would attend seven 90% or more white schools. At the same time, although testimony in the June hearings by school administrators indicated a consensus that desegregation of such schools could not be achieved without transporting students, the School Board had in August still taken no steps to acquire the necessary equipment. Because by that time it was too late to do so by the beginning of the 1970-71 school year, the plaintiffs were forced to accept only partial relief in the form of the School Board's inadequate plan on an interim basis.

The order approving that plan included a direction to the defendants to report to the Court by mid-November the specific steps taken to create a unitary system and to advise the Court of the earliest date such a system could be put into effect.

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[3] *Bradley* v. *School Board of the City of Richmond, supra*, 317 F. Supp. at 572-76.

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Appeals were noted by all parties, but efforts by the City Council to secure a stay, pursued at all levels, failed. On motion of the School Board, however, briefing was postponed by the Court of Appeals pending rulings by the Supreme Court on school desegregation cases then before that court. The effect of that order was to stay all appellate proceedings.

The School Board's November report stated only that three further desegregation plans were in preparation and would be submitted on January 15, 1971. These proposals were to be based on various assumptions concerning the Supreme Court's disposition of the cases before it.

In the meantime the School Board sought relief from the Court's outstanding order enjoining planned school construction. Depositions of expert witnesses were taken and the matter was submitted on briefs. The evidence disclosed that the School Board had not seriously reviewed the site and capacity decisions which it had made, according to earlier testimony, without consideration of their impact on efforts to desegregate. Rather it was reportedly determined that the sites chosen were compatible with various conceivable measures of the affirmative duty to desegregate, none of which was consistent with current decisions. Bases for the conclusions of compatibility, moreover, were not presented. The Court declined to lift the construction injunction. *Bradley* v. *School Board of City of Richmond*, —— F. Supp. —— (E.D. Va. Jan. 29, 1971).

In December, prior to consideration of the school construction issue, the plaintiffs moved for further relief effective during the second semester of the 1970-71 school year, stating that the defendants' report indicated that they did not intend further desegregation efforts during

the current year. The promised plans were filed in January.[4] The only proposal which promised more than an insubstantial advance over the inadequate interim plan, the School Board's Plan 3, required the purchase of transportation facilities which the School Board still would only say it would acquire if so ordered. In its November report the Board stated firmly its opposition to any mid-year modifications of the plan.

The Court declined to order further mid-year relief, *Bradley* v. *School Board of City of Richmond*, —— F. Supp. —— (E.D. Va., Jan. 29, 1971). Because of the nearly universal silence at appellate levels, which the Court interpreted as reflecting its own hope that authoritative Supreme Court rulings concerning the desegregation of schools in major metropolitan systems might bear on the extent of the defendants' duty, the Court felt that it would not be reasonable to require further steps to desegregate during the second semester, and particularly so in view of the expense of such steps and the likelihood that they could not become effective, on account of the delay in acquiring transportation facilities, until late in that semester. The fact remains, nonetheless, that the School Board had made effective and immediate further relief nearly impossible because it had not taken the specific step of seeking to acquire buses. This policy of inaction, until faced with a court order, is especially puzzling in view of representations later made by counsel for the School Board to the effect that at least fifty-six bus units would have to be bought, in the Board's view, in order to operate under

[4] They are described in this Court's prior opinion, *Bradley* v. *School Board of City of Richmond*, 325 F. Supp. 828 (E.D. Va., Apr. 5, 1971).

nearly any possible plan during the 1971-72 school year.

Finally, the Court heard further evidence on the plan to be implemented during 1971-72.[5] The School Board, as noted, offered three plans;[6] one only, as stated, would work to eliminate the substantial segregation that remained in Richmond schools. Plan 1 was a strictly contiguous geographic zoning system. Plan 2, at the elementary level, suffered from the same faults which had condemned the school administration's plan in *Swann* and the interim plan in this case. Plan 3 substantially eliminated the racial identifiability of numerous elementary facilities. But, although the Board prepared that plan, they did not urge its adoption but instead endorsed plan 2 for the 1971-72 school year. At the hearings, counsel for the School Board again stated that no further transportaiton units would be acquired unless the Court so ordered specifically, despite that the Court had found in August of 1970 that the interim plan did not achieve a sufficient level of desegregation and could be approved as a temporary expedient only in view of the lack of equipment necessary for further desegregation. The Court directed the adoption of plan 3 for the upcoming school year.

As a very general statement of the law, it is true that American courts do not reimburse the victorious litigant for the full price of his victory, his attorney's fees and expenses. See Goodhart, *Costs*, 38 Yale L.J. 849 (1929). Like most generalizations in law, this rule is subject to

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[5] The instant motion seeks only fees and expenses for litigation to January 29, 1971, but evidence of subsequent behavior of the defendants is relevant in that it tends to show a consistent policy, pursued at all stages of the case.

[6] Details of the proposals are given in *Bradley* v. *School Board of City of Richmond*, 325 F. Supp. 828 (E.D. Va., April 5, 1971).

several exceptions. The shape of these exceptions provides an example of the tensions existent in our system between two sources of legal rules: courts and legislatures. For the cases show that courts recognize a power in themselves, necessary at times in order fully to achieve justice, to direct that a losing litigant pay his opponent's attorney's fees. This power, if it has a statutory source at all, is conferred implicitly in the grant of equitable jurisdiction. At the same time legislative directives sometimes provide that a court may or must award a winning plaintiff reasonable counsel fees. Such statutes, not infrequently, form part of a more extensive legislative scheme which creates a legal right and the appropriate remedy for its violation. It is not difficult to see how legal doubts may arise as to the court's power in a certain case to direct the payment of fees. Most federal cases involve the vindication of statutory rights. In certain cases the question arises whether Congress, in omitting from legislation any provision for the award of counsel fees, intended to impose a restriction on available relief or intended instead to permit the courts to exercise the power resting in them under existing decisions. Conversely, where a fee award is specifically authorized, the question arises whether some different factual showing from that required under general equitable principles supports an award.

The plaintiffs do not argue that explicit statutory authorization exists for an award of counsel fees. The case is brought pursuant to 42 U.S.C. § 1983 and this Court's general equitable power to enforce constitutional protections; Congress has not mandated that judgments on such cases should as a matter of ordinary course include the payment of counsel fees. *Williams* v. *Kimbrough*, 415 F.2d 874 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

The case therefore presents an issue to be resolved on the basis of principles governing this Court's general equitable discretion, if discretionary power is available to the Court in matters of this nature. In seeking out whatever particular or special circumstances justify an award of attorney's fees, the Court must be mindful that this case should be compared not solely with other cases concerning school desegregation, but with all other types of litigation as well.

Sprague v. *Ticonic National Bank*, 307 U.S. 161 (1939), establishes that counsel fees and other litigation expenses, not taxable as costs by statute, may be awarded as part of a litigant's relief. "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts," *id.*, 164. One circumstance in which an award may be an appropriate use of the power of equity is that in which an individual litigant by his activities creates or preserves a fund in which others than he may have an interest.[7] *Sprague* was such a case, in effect, but the Court in that decision declined to limit the equity court's power to any particular circumstances. "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility . . . . In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice," *Id.*, 167.

Fleischmann Distilling Corp. v. *Maier Brewing Co.*, 386 U.S. 714 (1967), stresses that the principles allowing awards of counsel fees have no application in cases involv-

[7] See, *e.g.*, *Trustees* v. *Greenough*, 105 U.S. 527 (1881); *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 348 U.S. 950 (1970); *Gibbs* v. *Blackwelder*, 346 F.2d 943 (4th Cir. 1965); *Mercantile-Commerce Bank v. Southeast Arkansas Levee District*, 106 F.2d 966 (8th Cir. 1939).

ing "statutory causes of action for which the legislature had prescribed intricate remedies," *Id.*, 719, not intended by Congress to include the payment of counsel fees. *Fleischmann* has, however, been followed by *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968), and *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). In *Newman,* an action under the 1964 Civil Rights Act, 42 U.S.C. § 2000a, et seq., an enactment which provides in terms that its remedies are exclusive, 42 U.S.C. § 2000a-6(b), the Court held that a successful plaintiff should be awarded attorney's fees in the ordinary case, under a specific provision of the act. The Court noted, however, that such a sanction could have been imposed upon a defendant who litigated in bad faith for purposes of delay, *Newman* v. *Piggie Park Enterprises, supra,* 402 n. 4, even had Congress not authorized by statute an award of counsel fees.

In *Mills* the Court directed that a corporation reimburse plaintiffs in a derivative suit for their attorney's fees, despite that the statute involved made specific provision for attorney's fees only in sections other than that on which liability was predicated in the action. Congress' failure to establish precise bounds of possible relief for violation of its prohibitions (indeed the private right of action is implied) was thought to reflect an intention not to exclude the possibility of an award of attorney's fees under conventional principles. *Mills* v. *Electric Auto-Lite Co., supra,* 391. The Court directed an interim award on a variation of the fund theory.

Lower courts have also construed federal enactments, old and recent, not to bar an award of attorney's fees when equity would require it, in the absence of indicia of congressional purpose to render such relief unavailable. See

Lee v. *Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970) (42 U.S.C. § 1982); *Kahan* v. *Rosentiel, supra,* (Securities Exchange Act § 10b, Rule 10b-5); *Local 149, International Union, Automobile, Aircraft and Agricultural Implement Manufacturers of America* v. *American Brake Shoe Co.*, 298 F.2d 212 (4th Cir.), *cert. denied,* 369 U.S. 873 (1962) (Labor Management Relations Act § 301).

Section 1983 and general federal equitable power to protect constitutional rights are not restricted by any congressional language indicating an intention to preclude an award of counsel fees, either by express exclusion or the creation of an intricate remedial scheme. The statute creates liability

> "in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

In its reference to suits in equity the statute must be taken to authorize relief, such as an award of counsel fees, as might normally be available in such suits. Case law prior to *Fleischmann* in school desegregation cases, discussed below, recognizes the power of a federal equity court trying a desegregation suit to award counsel fees. In the light of the decisions subsequent to *Fleischmann,* such construction of § 1983 is not subject to serious question.

The issue, then, is whether this case is a proper one for a discretionary award.

Many of the cases directing or approving an award of attorney's fees turn upon the fund theory: the concept that, first, a litigant's counsel fees have been expended in such a manner as to benefit a number of other persons, not participating in the suit, and that, second, means are avail-

able whereby such outside beneficiaries can be made to bear something like a pro rata share of expenses by taking the fee from a defendant (a fiduciary, often) who holds or controls something in which the beneficiaries have an interest. School desegregation cases, or any suits against governmental bodies, do not fit this fund model without considerable cutting and trimming. This is a class suit to be sure, with class relief, but to say that the plaintiff class will actually in effect pay their attorneys if the School Board is made to pay counsel fees entails a number of unproved assumptions about the extent to which pupils pay for their free public schooling.

Nonetheless, the fund theory does not exhaust the grounds on which an equity decree to pay counsel fees may be based. Other cases exist in which "overriding considerations indicate the need for such recovery." *Mills* v. *Electric Auto-Lite Co., supra,* 391-92; see Note, 77 Harvard L.Rev. 1135 (1964). Such considerations in general are present when a party has used the litigation process for ends other than the legitimate resolution of actual legal disputes.

In *Guardian Trust Co.* v. *Kansas City Southern Railway Co.,* 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds,* 281 U.S. 1 (1930), the Eighth Circuit reviewed exhaustively the circumstances in which an equity court might allow costs "as between solicitor and client" despite the lack of statutory authority. That court concluded that such a fee award was proper in a number of instances, including those in which a fiduciary has defended his trust, or a party has defended his title to certain property against baseless and vexatious litigation, or a defendant, charged with gross misconduct, has prevailed on the merits.

In *Rude* v. *Buchalter,* 286 U.S. 451 (1932), the Supreme Court held unwarranted an award of attorney's fees against

> which was required, as a bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employing of counsel to institute and carry on extensive and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situations, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. *Id.*, 481.

Although the indication that such costs are proper if "essential to the doing of justice" in a sense begs the question, the factors mentioned give some guidance. The suit obviously benefited an entire class of Negro locomotive firemen. The defendant, equipped with legislatively-conferred bargaining powers, owed them something akin to a fiduciary's concern and had violated that duty. The resources of the parties were disproportionate. The cost of litigation was disproportionate to the monetary benefit to any one plaintiff. Last, the legal issues were relatively settled before suit. Analogous factors are present in the instant litigation.

In *Taussig* v. *Wellington Fund, Inc.*, 187 F. Supp. 179 (D. Del. 1960) *aff'd.* 313 F.2d 472 (3d Cir. 1963), *cert. denied,* 374 U.S. 806 (1963), a stockholders derivative suit charging unfair competition, the shareholder plaintiffs were awarded attorneys' fees not out of the treasury of their corporation, which their lawsuit presumably benefited, but against those guilty of unfair practices. Such an equitable damage award, the court said, must be premised on a finding that "the wrongdoers' actions were unconscion-

> which was required, as a bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employing of counsel to institute and carry on extensive and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situations, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. *Id.*, 481.

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able, fraudulent, willful, in bad faith, vexatious, or exceptional," *Id.*, 187 F. Supp. at 222 (footnotes omitted).

Our own Circuit ruled that it was within the power of a court of equity to award attorneys' fees in a suit under § 301 of the Taft-Hartley Act to enforce an arbitrator's award if it were shown that the employer's refusal to comply with the award was arbitrary and unjustified. The decision was based on precedents establishing a court's equitable power and on the judicial duty to develop a body of federal law under § 301. In the particular case the litigation was justified, and a fee award improper, because questions of some legal substance remained. *Local 149, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *American Brake Shoe Co., supra.*

In *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962), attorneys' fees as an item of damages or an admiralty case were held due when the owner's conduct toward an ill seaman was consistently stubborn:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. *Id.*, 530-31.

A district court in another case declined to exercise its acknowledged equity power to award attorneys' fees in a suit against a labor union, finding no "fund" had been created and no compelling circumstances otherwise existed. The court commented, however, that:

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> [W]ith the possible exception of civil rights litigation, see *Bell* v. *School Bd.*, 321 F.2d 500 (4th Cir. 1963), 77 Harv. L. Rev. 1135 (1964), no area is more susceptible to the salutary effects of the exercise of the chancellor's power to award counsel fees without the presence of a fund than litigation involving a member and his union. Primarily, this litigation seeks solely equitable relief and traditionally puts an impecunious group of members against a solvent union with little expectation of a substantial monetary award from which to pay a counsel fee, even a contingent one. This recognition has prompted several courts to allow counsel fees to successful union members who through litigation have corrected union abuse even though they have not established a fund or conferred a pecuniary benefit upon the commonwealth of the union. *Cutler* v. *American Federation of Musicians*, 231 F. Supp. 845 (S.D. N.Y. 1964), *aff'd.* 366 F.2d 779 (2d Cir. 1966), *cert. denied*, 386 U.S. 993 (1967).

A class suit to reapportion a local government unit, *Dyer* v. *Love*, 307 F. Supp. 974 (N.D. Miss. 1969), was the context for an award of counsel fees in a civil rights case. When the defendants, members of a board of supervisors, declined to reapportion their constituents, despite gross population variations between districts, and instead forced citizens to initiate "vigorously opposed" litigation, the court found this "unreasonable and obstinate" conduct to be fair basis for a fee allowance, even though there had been no Supreme Court holding during most of the suit's pendency explicitly defining the defendants' duty, *Id.*, 987. The direction of the developing law, the court said, should have

been clear. Additionally, the court held that the absence of any fee agreement between plaintiffs and their lawyer constituted no bar to an award, because it was within the court's power to order payment to the attorneys themselves.

In another case out of the same court, an allowance of counsel fees was denied when the losing defendants, public educational administrators, were found not to have presented their defenses "in bad faith or for oppressive reasons," *Stacy* v. *Williams*, 50 F.R.D. 52 (N.D. Miss. 1970).

In *Lee* v. *Southern Home Sites Corp.*, *supra*, the Fifth Circuit authorized attorneys' fee awards in a suit under 42 U.S.C. § 1982 contesting racial discrimination in housing sales, relying on the directive in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), to fashion appropriate and effective equitable remedies for § 1982 violations. The discretionary power clearly exists, the court said, and its exercise is especially appropriate in civil rights cases, where often discrimination with wide public impact can be terminated only by private lawsuit and problems of securing legal representation have been recognized. However, because the district court's exercise of its discretion could only be reviewed on the basis of factfindings on the relevant issues, the case was remanded for further proceedings.

Numerous other cases support the power of a court of equity to allow counsel fees when a litigant's conduct has been vexatious or groundless, or he has been guilty of overreaching conduct or bad faith. See *Siegel* v. *William E. Bookhultz & Sons*, 419 F.2d 720 (D.C. Cir. 1969); *Smith* v. *Allegheny Corp.*, 394 F.2d 381 (2d Cir.) *cert. denied*, 393 U.S. 939 (1968); *McClure* v. *Borne Chemical Co.*, 292 F.2d 824 (3d Cir.) *cert. denied*, 368 U.S. 939 (1961); *In re Carico*, 308 F. Supp. 815 (E.D. Va. 1970); *Stevens* v. *Abbott, Proctor & Paine*, 288 F. Supp. 836 (E.D. Va. 1968).

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School desegregation decisions illustrate the specific application of a court's equitable discretion to allow counsel fees to plaintiffs when the evidence shows obstinate noncompliance with the law or imposition by defendants on the judicial process for purposes of harassment or delay in affording rights clearly owing. See, e.g. *Nesbit* v. *Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969); *Williams* v. *Kimbrough, supra; Cato* v. *Parham*, 403 F.2d 12 (8th Cir. 1968); *Rolfe* v. *County Board of Education of Lincoln County*, 391 F.2d 77 (6th Cir. 1968); *Hill* v. *Franklin County Board of Education*, 390 F.2d 583 (6th Cir. 1968); *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661 (6th Cir. 1966); *Griffin* v. *County School Board of Prince Edward County*, 363 F.2d 206 (4th Cir. 1966); *Kemp* v. *Beasley*, 352 F.2d 14 (8th Cir. 1965); *Bradley* v. *School Board of City of Richmond, supra*, 345 F.2d; *Rogers* v. *Paul*, 345 F.2d 117 (8th Cir.) *rev'd on other grounds*, 382 U.S. 198 (1965); *Brown* v. *County School Board of Frederick County*, 327 F.2d 655 (4th Cir. 1964); *Bell* v. *County School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963); *Pettaway* v. *County School Board of Surry County*, 230 F. Supp. 480 (E.D. Va.) *rev'd on other grounds*, 339 F.2d 486 (4th Cir. 1964). See also, *Felder* v. *Harnett County Board of Education*, 409 F.2d 1070 (4th Cir. 1969), concerning Appellate Rule 38 and "frivolous" appeals.

A prior appellate opinion in this case states that district courts should properly exercise their power to allow counsel fees only "when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obstinate obduracy." *Bradley* v. *School Board of City of Richmond, supra*, 345

F.2d at 321. The Court of Appeals recognized that appellate review of such orders, however, necessarily had a narrow scope and failed to disturb a nominal fee award.

In determining whether this particular lawsuit was unnecessarily precipitated by the School Board's obduracy, the Court cannot "turn the clock back," *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 492 (1954), to 1965. The School Board's conduct must be considered with reference to the state of the law in 1970. The Court has already reviewed the course of the litigation. It should be apparent that since 1968 at the latest the School Board was clearly in default of its constitutional duty. When hailed into court, moreover, it first admitted its noncompliance, then put into contest the responsibility for persisting segregation. When liability finally was established, it submitted and insisted on litigating the merits of so-called desegregation plans which could not meet announced judicial guidelines. At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order.

Other courts have catalogued the array of tactics used by school authorities in evading their constitutional responsibilities, *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 13 (April 20, 1971) (slip opinion at 9); *Jones* v. *Alfred H. Mayer Co., supra*, 448 n.5 (1968) (Douglas, J., concurring); *Wright* v. *Council of the City of Emporia*, No. 14,552, 442 F.2d 570, 593 (4th Cir. 1971) (slip opinion at 13-14) (Sobeloff, J., dissenting). The freedom of choice plan under which Richmond was operating clearly was one such. When this Court

filed its opinion of August 17, 1970, confirming the legal invalidity of that plan, the HEW proposal, and the interim plan, it was not propounding new legal doctrine. Because the relevant legal standards were clear it is not unfair to say that the litigation was unnecessary. It achieved, however, substantial delay in the full desegregation of city schools. Courts are not meant to be the conventional means by which persons' rights are afforded. The law favors settlement and voluntary compliance with the law. When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes.

It is not argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense.

As long ago as 1966 a court of appeals in another circuit uttered a strong suggestion that evasion and obstruction of desegregation should be discouraged by compelling state officials to bear the cost of relief:

> The Board is under an immediate and absolute constitutional duty to afford non-racially operated school programs, and it has been given judicial and executive guidelines for the performance of that duty. If well-known constitutional guarantees continue to be ignored or abridged and individual pupils are forced to resort

to the courts for protection, the time is fast approaching when the additional sanction of substantial attorneys' fees should be seriously considered by the trial courts. Almost solely because of the obstinate, adamant, and open resistance to the law, the educational system of Little Rock has been embroiled in a decade of costly litigation, while constitutionally guaranteed and protected rights were collectively and individually violated. The time is coming to an end when recalcitrant state officials can force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights. *Clark* v. *Board of Education of Little Rock School District, supra,* 671.

That time has now expired. See also, *Cato* v. *Parham, supra.* Our Court of Appeals, too, has indicated a willingness to place litigation costs on defendants in recent cases; in *Nesbit* v. *Statesville City Board of Education, supra,* they took the unusual step of directing the district court to exercise its discretion in the matter in favor of the plaintiffs. This was also done six years before in *Bell* v. *County School Board of Powhatan County, supra,* when aggravated misconduct was shown; in *Nesbit,* by contrast, the defendants seem to have been guilty of delay alone.

Not only has the continued litigation herein been precipitated by the defendants' reluctance to accept clear legal direction, but other compelling circumstances make an equitable allowance necessary. This has been a long and complex set of hearings. Plaintiffs' counsel have demonstrated admirable expertise, discussed below, but from the beginning the resources of opposing parties have been dis-

proportionate. Ranged against the plaintiffs have been the legal staff of the City Attorney's office and retained counsel highly experienced in trial work. Additionally the School Board possessed the assistance of its entire administrative staff for investigation and analysis of information, preparation of evidence, and expert testimony of educators. Few litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation task at hand. Sums paid outside counsel alone far exceed the plaintiffs' estimate of the cost of their time and effort.

Moreover, this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class (something which must give pause to all attorneys, sensitive as is the profession to its ethical responsibilities) necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes. Coupled with the cost of proof is the likely personal and professional cost to counsel who work to vindicate minority rights in an atmosphere of resistance or outright hostility to their efforts. See *NAACP* v. *Button*, 371 U.S. 415, 435-36 (1963); *Sanders* v. *Russell*, 401 F. 2d 241 (5th Cir. 1968).

Still further, the Court must note that the defendants' delay and inaction constituted more than a cause for needless litigation. It inspired in a community conditioned to segregated schools a false hope that constitutional interpretations as enunciated by the courts pursuant to their responsibilities, as intended by the Constitution, could in

some manner, other than as contemplated by that very document, be influenced by the sentiment of a community.

The foregoing in no manner is intended to express a lack of personal compassion for the difficult and arduous task imposed upon the members of the defendant school board. Nevtherless they, and indeed the other defendants as well, had a public trust to encourage what may well be considered one of the most precious resources of a community; an attitude of prompt adherence to the law, regardless of the manifested erroneous view that mere opposition to constitutional requirements would in some manner result in a change in those requirements.

Power over public education carries with it the duty to provide that education in a constitutional manner, a duty in which the defendants failed.

These general factors were present, although in lesser magnitude, in the *Rolax* case in 1951, in which the Fourth Circuit said that an award of counsel fees would be fully justified.

Passing the question of the appropriateness of allowing fees on the basis of traditional equitable standards, the Court is persuaded that in 1970 and 1971 the character of school desegregation litigation has become such that full and appropriate relief must include the award of expenses of litigation. This is an alternative ground for today's ruling.

The circumstances which persuaded Congress to authorize the payment of attorney's fees by statute under certain sections of the 1964 Civil Rights Act, see 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), very often are present in even greater degree in school desegregation litigation. In *Newman* v.

Piggie Park Enterprises, Inc., supra, the Supreme Court elucidated the logic underlying the 1964 legislation:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. *Id.,* 401-02.

Newman was followed in *Miller* v. *Amusement Enterprises, Inc.,* 426 F. 2d 534 (5th Cir. 1970), in which the court recognized that in cases where the plaintiffs had undertaken no obligation to pay counsel, congressional purposes would best be served by directing payment to the lawyers.

The rationale of *Newman,* moreover, has equal force in employment discrimination cases, even where plaintiffs are only partially successful, where their lawsuit serves to bring an employer into compliance with the Act. *Lea* v. *Cone Mills Corp.,* No. 14,068, 438 F. 2d 80 (4th Cir. Jan. 29, 1971); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F. 2d 421 (5th Cir. 1970).

School desegregation cases almost universally proceed as class actions. Use of this unconventional form of action

converts a private lawsuit into something like an administrative hearing on compliance of a crucial public facility with legal rules defining, in part, its mission. Such result has come about as the law developed so that it protects as a matter of individual right not just admission into formerly white schools of black applicants, but attendance in a nondiscriminatory school system. *Green* v. *County School Board of New Kent County, supra; Bradley* v. *School Board of City of Richmond,* 317 F. 2d 429 (4th Cir. 1963).

Manifestly, too, not only are the rights of many asserted in such suits, but also it has become a matter of vital governmental policy not just that such rights be protected, but that they be immediately vindicated in fact. See 42 U.S.C. § 2000e, et seq. Partly this national goal has been pursued by administrative proceedings, but a large part of the job has fallen to the courts, and for them it has been a task of unaccustomed extent and difficulty. "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. 1, 13.

The private lawyer in such a case most accurately may be described as "a private attorney general." Whatever the conduct of defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of nondiscrimination as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. The fulfillment of constitutional guaranties, when to do so profoundly alters a key

social institution and causes reverberations of untraceable extent throughout the community, is not a private matter. Indeed it may be argued that it is a task which might better be undertaken in some framework other than the adversary system. Courts adapt, however; but in doing so they must recognize the new legal vehicles they create and ensure that justice is accomplished fully as effectively as under the old ones. The tools are available. Under the Civil Rights Act courts are required fully to remedy an established wrong, *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 232-34 (1964), and the payment of fees and expenses in class actions like this one is a necessary ingredient of such a remedy.

This rule is consistent with the Court's power and serves an evident public policy to encourage the just and efficient disposition of cases concerning school desegregation. Cf. 42 U.S.C. § 2000c-6. It serves no person's interest to decide these cases on the basis of a haphazard presentation of evidence, hampered by inadequate manpower for research into the bases of liability and the elements of relief. Where the interests of so many are at stake, justice demands that the plaintiffs' attorneys be equipped to inform the court of the consequences of available choices; this can only be done if the availability of funds for representation is not left to chance. In this unprecedented form of public proceeding, exercise of equity power requires the Court to allow counsel's fees and expenses, in a field in which Congress has authorized broad equitable remedies "unless special circumstances would render such an award unjust," *Newman* v. *Piggie Park Enterprises, Inc., supra*, 402. No such circumstances are present here.

The amount of the allowance is not difficult to establish. Counsel have agreed to submit the matter of costs, fees and expenses to the Court on documentary evidence. The period of time to which this opinion relates runs from the March, 1970, motion for further relief until January 29, 1971. Findings of fact as to defendants' actions after that date have been made; these tend to establish their continuing pattern of inaction and resistance.

Trial counsel for the plaintiffs demonstrated throughout the litigation a grasp of the material facts and a command of the relevant law equaled by very few lawyers who have appeared before this Court. Needless to say their understanding of the field enabled them to be of substantial assistance to the Court, which is their duty. Local counsel did not examine witnesses, but assisted in pretrial preparation and also at hearings, as required by local rules. Some of the working hours included in counsel's estimates of time spent, moreover, include travel times. These are properly listed for two reasons. First, counsel can and do work while traveling. Second, other complex cases often require parties to enlist the aid of out-of-town counsel, for whose travel time they pay.

In conformity with practice in his home bar of Memphis, Tennessee, a lawyer for the plaintiffs secured three affidavits from disinterested brother counsel stating their estimate of the fair value of legal services rendered by plaintiffs' counsel. The affidavits state facts showing a current familiarity with prevailing fee rates and with, in two cases, the full case file. Considering the abilities of counsel, the time required, and the results achieved, these lawyers placed a value on the services very close to the estimates of the plaintiffs.

Memorandum Opinion of District Court in Bradley Action

The Virginia Supreme Court of Appeals long ago set forth the factors relevant to the value of an attorney's services:

> [c]ircumstances to be considered . . . are the amount and character of the services rendered, the responsibility imposed; the labor, time and trouble involved; the character and importance of the matter in which the services are rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in their profession of the attorneys; and whether or not the fee is absolute of contingent . . . The result secured by the services of the attorney may likewise be considered; but merely as bearing upon the consideration of the efficiency with which they were rendered, and in that way, upon their value on a quantum meruit, not from the standpoint of their value to the client. *Campbell County* v. *Howard*, 133 Va. 19, 112 S.E. 2d 876, 885 (1922).

In this case the marshalling of evidence on liability and especially on remedy were complex tasks. The responsibility was probably as great as ever falls upon a private lawyer. Time spent was considerable; the Court accepts the estimates of time and expenses dated January 6, 1970, as modified in a memorandum submitted on March 15, 1970. The subject of the litigation was of the utmost importance. The Court has already referred to the lawyers' performance, which they undertook without assurance of reasonable compensation. Substantial results, too, were secured by their efforts.

On the basis of these factors, plus the equitable considerations compelling an allowance, the Court has determined that a reasonable attorney's fee would be $43,355.00.[8]

Expense incurred, including taxable costs, have also been estimated by the plaintiffs. As in the case of attorney's fees, these cover the period from March of 1970 through January 29, 1971, and relief is not requested with reference to matters raised by the motion for joinder of further parties filed by the School Board. Costs and expenses as to those matters are therefore not under consideration.

Because the Court has decided that plaintiffs' counsel are due an allowance of the actual expenses of the litigation, it is not necessary to determine whether certain items of expense would in the usual case be taxable as costs under 28 U.S.C. § 1920; see 6 Moore's Federal Practice ¶ 54.70, et seq. (2d ed. 1966).

Many of the expenses incurred by plaintiffs' counsel are attributable to their traveling from New York and Memphis for preparation and trial, but, as the Court already said, the complexity of cases of this sort often, as here, justifies the use of counsel from outside the local bar. The difficulty of retaining local trial counsel must be especially great in litigation over minorities' civil rights; the unpopularity of the causes and the likelihood of small reward discourage many lawyers even from mastering the field of law, much less accepting the cases. Expenses for travel, hotel accommodations and restaurant meals are fairly allowable. The Court takes notice of the fact that

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[8] The Court has reduced the requested allowance pursuant to the supplemental memorandum filed by plaintiffs under date of Mar. 15, 1971, and in addition has deducted the item of $990 having to do with City Council's requested stay of Court's order of August 1970.

the absence of an attorney from the area of his office usually results in financial hardship in relation to the balance of his practice, and there ought not to be superimposed thereon additional living expenses.

Fees for expert witnesse' testimony likewise will be allowed as an expense of suit. It is difficult to imagine a more necessary item of proof (and source of assistance to the Court) than the considered opinion of an educational expert.

Investigation assistance and office supplies likewise are obviously proper; one must contrast the rather minimal expenses of the plaintiffs under this heading with the resources used by the defendants.

Transcript costs, including those for depositions which were taken with the Court's encouragement, and miscellaneous court fees are allowable.

The Court will not assess against the School Board, however, expenses occasioned by the stay applications unsuccessfully filed by the Richmond City Council. These may be considered on a separate application.

The Court computes the total allowable expenses to be $13,064.65. The total award, including counsel fees, comes to $56,419.65.[9] This is a large amount, but it falls well below the value of efforts made in defending the suit. Outside counsel for the School Board to date have submitted bills well in excess of the amounts awarded. [Portions of the submitted bills cover periods with which we are not here concerned.] In addition, as noted above, the defendants made use of the regular legal staff of the City

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[9] Expenses incurred in reference to City Council's request for stay of August 1970 order are not included herein, nor are expenses allocated to filing of amended complaint.

Attorney and the School Board's administrative staff. For purposes of comparison, in a recent antitrust case tried by one Richmond attorney and two lawyers from outside the local bar, this Court awarded $117,000 in counsel fees. The amount in this case is not excessive.

For the reasons stated, an order shall enter this day decreeing the payment of the sum mentioned to counsel for the plaintiffs.

ROBERT R. MERHIGE
United States District Judge

Date: May 26, 1971

Opinion of United States Court of Appeals in *Bradley* Action

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1774

CAROLYN BRADLEY, etc., *et al.*,

Appellees,

—versus—

THE SCHOOL BOARD OF
THE CITY OF RICHMOND, VIRGINIA, *et al.*,

Appellant.

Section III of the opinion, dealing with the application of Section 718 to the proceedings, heard October 2, 1972,

Before HAYNSWORTH, Chief Judge, WINTER, CRAVEN, RUSSELL and FIELD, Circuit Judges (Butzner, Circuit Judge, being disqualified) sitting en banc;

Other parts of the cause heard March 7, 1972,

Before WINTER, CRAVEN and RUSSELL, Circuit Judges.

Decided November 29, 1972.

RUSSELL, Circuit Judge:

This appeal challenges an award of attorney's fees made to counsel for plaintiffs in the school desegregation suit filed against the School Board of the City of Richmond, Virginia. Though the action has been pending for a num-

ber of years,[1] the award covers services only for a period from March, 1970, to January 29, 1971. It is predicated on two grounds: (1) that the actions taken and defenses entered by the defendant School Board during such period represented unreasonable and obdurate refusal to implement clear constitutional standards; and (2) apart from any consideration of obduracy on the part of the defendant School Board since 1970, it is appropriate in school desegregation cases, for policy reasons, to allow counsel for the private parties attorneys' fees as an item of costs. The defendant School Board contends that neither ground sustains the award. We agree.

We shall consider the two grounds separately.

I.

This Court has repeatedly declared that only in "the extraordinary case" where it has been "'found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy' or persistent defiance of law", would a court, in the exercise of its equitable powers, award attorney's fees in school desegregation cases. *Brewer* v. *School Board of City of Norfolk, Virginia* (4th Cir. 1972), 456 F.2d 943, 949. Whether the conduct of the School Board constitutes "obdurate obstinacy" in a particular case is ordinarily committed to the discretion of the District Judge, to be disturbed only "in the face of compelling circumstances", *Bradley* v. *School Board of City of Richmond, Virginia* (4th Cir. 1965), 345 F.2d 310, 321. A finding of obduracy

[1] See Note 1 in majority opinion of *Bradley* v. *The School Board of the City of Richmond, Virginia*, decided June 5, 1972, for history of this litigation.

by the District Court, like any other finding of fact made by it, should be reversed, however, if "the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.* (1948), 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; Wright-Miller, *Federal Practice and Procedure*, Vol. 9, p. 731 (1971). We are convinced that the finding by the District Court of "obdurate obstinacy" on the part of the defendant School Board in this case was error.

Fundamental to the District Court's finding of obduracy is its conclusion that the litigation, during the period for which an allowance was made, was unnecessary and only required because of the unreasonable refusal of the defendant School Board to accept in good faith the clear standards already established for developing a plan for a non-racial unitary school system. This follows from the pointed statements of the Court in the opinion under review that, "Because the relevant legal standards were clear it is not unfair to say that the litigation (in this period) was unnecessary", and that, "When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes." [2] At another point in its opinion, the Court uses similar language, declaring that "the continued litigation herein (has) been precipitated by the defendants' reluctance to accept clear legal direction, * * *." [3] It would appear,

[2] See, 53 FRD at p. 39.

[3] 53 FRD at p. 40.

however, that these criticisms of the conduct of the Board, upon which, to such a large extent, the Court's award rests, represent exercises in hindsight rather than appraisal of the Board's action in the light of the law as it then appeared.[4] The District Court itself recognized that, during this very period when it later found the Board to have been unreasonably dilatory, there was considerable uncertainty with reference to the Board's obligation, so much so that the Court had held in denying plaintiffs' request for mid-school year relief in the fall of 1970, that "it would not be reasonable to require further steps to desegregate * * *," giving as its reason: "Because of the nearly universal silence at appellate levels, which the Court interpreted as reflecting its own hope that authoritative Supreme Court rulings concerning the desegregation of schools in major metropolitan systems might bear on the extent of the defendants' duty." [5] In fact, in July, 1970, the Court was writing to counsel that, "In spite of the guidelines afforded by our Circuit Court of Appeals and the United States Supreme Court, there are still many practical problems left open, as heretofore stated, including to what extent school districts and zones may or must be altered as a constitutional matter. A study of the cases shows almost limitless facets of study engaged in by the various school authorities throughout the country in attempting to achieve the necessary results." [6] The District

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[4] See *Monroe* v. *Board of Com'rs. of City of Jackson, Tenn.* (6th Cir. 1972), 453 F.2d 259, 263:

"In determining whether this Board's conduct was, as found by the District Court, unduly obstinate, we must consider the state of the law as it then existed."

[5] 53 FRD at p. 33.

[6] See, Joint Appendix 74-75.

Court had, also, earlier defended the School Board's request of a stay of an order entered in the proceedings on August 17, 1970, stating: "Their original (the School Board's) requests to the Fourth Circuit that the matter lie in abeyance were undoubtedly based on valid and compelling reasons, and ones which the Court has no doubt were at the time both appropriate and wise, since defendants understandably anticipated a further ruling by the United States Supreme Court in pending cases; * * *."[7] Earlier in 1970, too, the Court had taken note of the legal obscurity surrounding what at that time was perhaps the critical issue in the proceeding, centering on the extent of the Board's obligation to implement desegregation with transportation. Quoting from the language of Chief Justice Burger in his concurring opinion in *Norcross* v. *Board of Education of Memphis, Tenn. City Schools* (1970), 397 U. S. 232, 237, 90 S. Ct. 891, 25 L. Ed. 2d 426, the District Court observed that there are still practical problems to be determined, not the least of which is "to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court."[8] In fact, the District Court had during this very period voiced its own perplexity, despairingly commenting that "no real hope for the dismantling of dual school systems (in the Richmond School system) appears to be in the offing unless and until there is a dismantling of the all Black residential areas."[9] At this time, too, as the District Court pointed out, there was some difficulty in applying even the term

[7] 325 F. Supp. at p. 832.

[8] 317 F. Supp. at p. 575.

[9] 317 F. Supp. at p. 566.

"unitary school system".[10] In summary, it was manifest in 1970, as the District Court had repeatedly stated, that, while *Brown* and other cases had made plain that segregated schools were invalid, and that it was the duty of the School Board to establish a non-racial unitary system, the practical problems involved and the precise standards for establishing such a unitary system, especially for an urbanized school system—which incidentally were the very issues involved in the 1970 proceedings—had been neither resolved nor settled during 1970; in fact, the procedures are still matters of lively controversy.[11] It would seem, therefore, manifest that, contrary to the premise on which the District Court proceeded in its opinion, the legal standards to be followed by the Richmond School Board in working out an acceptable plan of desegregation for its system were not clear and plain at any time in 1970 or even 1971.

It is true, as the District Court indicates, that the Supreme Court in 1968 had, in *Green* v. *County School Board* (1968), 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, found "freedom-of-choice" plans that were not effective unacceptable instruments of desegregation, and that the defendant Board, following that decision, had taken no affirmative steps on its own to vacate the earlier Court-approved

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[10] That this term "unitary" is imprecise, the District Court stated in 325 F. Supp. at p. 844:

> "The law establishing what is and what is not a unitary school system lacks the precision which men like to think imbues other fields of law; perhaps much of the public reluctance to accept desegregation rulings is attributable to this indefiniteness."

[11] ***Bradley*** **v.** ***The School Board of the City of Richmond, Virginia,*** decided June 5, 1972, *supra.*

"freedom-of-choice" plan for the Richmond School system, or to submit a new plan to replace it. In *Green*, the Court had held that, "if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable." [12] In suggesting zoning, *Green* offered a ready and easily applied alternative to "freedom-of-choice" for a thinly populated, rural school district such as Old Kent, but other than denying generally legitimacy to freedom-of-choice plans, *Green* set forth few, if any, standards or benchmarks for fashioning a unitary system in an urbanized school district, with a majority black student constituency, such as the Richmond school system. In fact, a commentator has observed that "*Green* raises more questions than it answers".[13] Perhaps the School Board, despite the obvious difficulties, should have acted promptly after the *Green* decision to prepare a new plan for submission to the Court. Because of the vexing uncertainties that confronted the School Board in framing a new plan of desegregation, problems which, incidentally, the District Court itself finally concluded could only be solved by the drastic and novel remedy of merging independent school districts,[14] and pressed with no local complaints from plaintiffs or others, it was natural that the School Board would delay. Mere inaction under such circumstances, however, and in the face of the "practical difficulties" as reflected in the

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[12] 391 U.S. at p. 441.

[13] 82 *Har. L. Rev.* 116.

[14] A measure found inappropriate by this Court in *Bradley* v. *The School Board of the City of Richmond, Virginia*, decided June 5, 1972, *supra*.

later litigation, cannot be fairly characterized as obdurateness. Indeed the plaintiffs themselves were in some apparent doubt as to how they wished to proceed in the period immediately after *Green* and took no action until March, 1970. Even then they offered no real plan, contenting themselves with demanding that the School Board formulate a unitary plan, and with requesting an award of attorney's fees. It is unnecessary to pursue this matter, however, since the District Court does not seem to have based its award upon the inaction of the School Board prior to March 10, 1970, but predicated its award on the subsequent conduct of the School Board.

The proceedings, to which this award applies, began with the filing by the plaintiffs of their motion of March 10, 1970, in which they asked the District Court to "require the defendant school board forthwith to put into effect a method of assigning children to public schools and to take other appropriate steps which will promptly and realistically convert the public schools of the City of Richmond into a unitary non-racial system from which all vestiges of racial segregation will have been removed; and that the Court award a reasonable fee to their counsel to be assessed as costs." With the filing of this motion, the Court ordered the defendant School Board to "advise the Court if it is their position that the public schools of the City of Richmond, Virginia are being operated in accordance with the constitutional requirements to operate unitary schools as enunciated by the United States Supreme Court." It added that, should the defendant School Board not contend that its present operations were in compliance, it should "advise the Court the amount of time" needed "to submit a plan." Promptly, within less than a week after the Court issued

this order, the School Board reported to the Court that (1) it had been advised that it was not operating "unitary schools in accordance with the most recent enunciations of the Supreme Court of the United States" and (2) it had requested HEW, and HEW had agreed, to make a study and recommendations that would "ensure" that the operation of the Richmond Schools was in compliance with the decisions of the Supreme Court. This HEW plan was to be made available "on or about May 1, 1970" and the Board committed itself to submit a proposed plan "not later than May 11, 1970". A few days later, the District Court held a pre-trial hearing and specifically inquired of the School Board as to the necessity for "an evidentiary hearing" on the legality of the plan under which the schools were then operating. The defendant School Board candidly advised the Court that, so far as it was concerned, no hearing was required since it "admitted that their (its) freedom-of-choice plan, although operating in accord with this Court's order of March 30, 1966, was operating in a manner contrary to constitutional requirements." [15] The District Court characterizes this concession by the School Board as "reluctantly" given, and its finding of reluctance at this early stage in the proceeding is an element in the District Court's conclusion that the School Board has been obdurate. The record, however, provides no basis for this characterization of the conduct of the School Board. The School Board had manifested no reluctance to concede that its existing plan of operation did not comply with *Green*. When called on by the Court for a response to plaintiffs' motion, it had acted with becoming dispatch to enlist the assistance of that agency of Government supposed to have expertise in the

[15] 338 F. Supp. 71.

area of school desegregation and charged by law with the duty of assisting school districts with such problems. Every action of the School Board at this stage could be said to be reasonably calculated to facilitate the progress of the proceedings and to lighten the burdens of the Court. This conclusion is supported by the fact that what the Board did was apparently found acceptable and helpful by both the Court and the plaintiffs. Neither contended that the proposed time-table was dilatory or that the use of HEW was an inappropriate agency to prepare an acceptable plan. As a matter of fact, the utilization of the services of HEW under these circumstances was an approved procedure at the time, one recommended by courts repeatedly to school districts confronted with the same problem as the Richmond schools.[16]

On May 4, 1970, HEW submitted to the School Board its desegregation plan, prepared, to quote HEW, in response to the Board's own "expressed desire to achieve the goal of a unitary system of public schools and in accordance with our interpretation of action which will most

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[16] *Green* v. *School Board of City of Roanoke, Virginia* (4th Cir. 1970), 428 F.2d 811, 812; *Monroe* v. *County Bd. of Education of Madison Co., Tenn.* (6th Cir. 1971), 439 F.2d 804, 806; Note, The Courts, HEW and Southern School Desegregation, 77 Yale L. J. 321 (1967).

During oral argument, counsel for the plaintiffs contended that HEW had in recent months become a retarding factor in school desegregation actions, citing *Norcross* v. *Board of Education of Memphis*, Civ. No. 3931 (W.D. Tenn., Jan. 12, 1972), —— F. Supp. ——, ——. Without passing on the justice of the criticism, it must be borne in mind this was not the view in 1970, as is evident in the decisions cited. This argument emphasizes again, it may be noted, the erroneous idea that the reasonableness of the Board's conduct in 1970 is to be tested, not by circumstances as they were understood then, but in the light of 1972 circumstances.

soundly achieve this objective." In formulating its plan, HEW received no instructions from the School Board, "Except to try our best to meet the directive of the Court Order and they gave me the Court Order." There were no meetings of the School Board and HEW "until the plan had been developed in almost final form." Manifestly, the Board acted throughout the period when HEW was preparing its plan, in utmost good faith, enjoining HEW "to meet the directive" of the Court and relying on that specialized agency to prepare an acceptable plan. The Board approved, with a slight, inconsequential modification, the plan as prepared by HEW and submitted it to the Court on May 11, 1970. The District Court faults the Board for submitting this plan, declaring that the plan "failed to pass legal muster because those who prepared it were limited in their efforts further to desegregate by self-imposed restrictions on available techniques" [17] and emphasizing that its unacceptability "should have been patently obvious in view of the opinion of the United States Court of Appeals for the Fourth Circuit in *Swann* v. *Charlotte-Mecklenburg Board of Education* 431 F.2d (138), (4th Cir. 1970), which had been rendered on May 26, 1970." [18] The failure to use "available techniques" such as "busing and satellite zonings" and whatever "self-imposed limitations" may have been placed on the planners were not the fault of the School Board but of HEW, to whom the School Board, with the seeming approval of the Court and the plaintiffs, had committed without any restraining instructions the task of preparing an acceptable plan. Moreover, at the time the

[17] See, 53 F.R.D. at p. 31.

[18] See, 338 F. Supp. at p. 71.

plan was submitted to the Court by the School Board, *Swann* had not been decided by this Court. And when the Court disapproved the HEW plan, the Board proceeded in good faith to prepare on its own a new plan that was intended to comply with the objectives stated by the Court.

The Court did find some fault with the Board because, "Although the School Board had stated, as noted, that the free choice system failed to comply with the Constitution, producing as it did segregated schools, they declined to admit during the June (1970) hearings that this segregation was attributable to the force of law (transcript, hearing of June 20, 1970, at 322)" and that as a result, "the plaintiffs were put to the time and expense of demonstrating that governmental action lay behind the segregated school attendance prevailing in Richmond."[19] This claim of obstruction on the part of the Board is based on the latter's refusal to concede, in reply to the Court's inquiry, "that free choice did not work because it was *de facto* segregation".[20] It is somewhat difficult to discern the importance of determining whether the "free choice" plan represented "*de facto* segregation" or not: It was candidly conceded by the School Board that "free choice", as applied to the Richmond schools, was impermissible constitutionally, and this concession was made whether the unacceptability was due to "*de facto*" segregation or not.[21] In a school system such as that of Richmond, where there had been formerly *de jure* segregation, *Green* imposed on the School Board the "duty to eliminate racially identifiable

[19] See, 53 FRD at p. 30.

[20] See Joint Appendix 47, Tr. p. 322.

[21] See 345 F.2d 322.

schools even where their preservation results from educationally sound pupil assignment policies." [22] The School Board's duty was to eliminate, as far as feasible, "racially identifiable schools" in its systems.[23] The real difficulty with achieving this result was that, whatever may have been the reasons for its demographic and residential patterns,[24]

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[22] 82 *Har. L. Rev.* 113; cf., *Ellis* v. *Board of Public Instruction of Orange Co., Fla.* (5th Cir. 1970), 423 F.2d 203, 204.

[23] The very term "racially identifiable" has received no standard definition. In *Beckett* v. *School Board of City of Norfolk* (D.C. Va. 1969), 308 F. Supp. 1274, 1291, rev. on other grounds, 434 F.2d 408, the Court found that a school in which the representation of the minority group was 10 per cent or better was not "racially identifiable". Dr. Pettigrew, the expert witness on whom the District Court in this proceeding relied heavily and who testified in *Beckett,* used 20 per cent in determining "racially identifiable" school population. See 308 F. Supp. 1291. The recent case of *Yarbrough* v. *Hulbert-West Memphis School Dist. No. 4* (8th Cir. 1972), 457 F.2d 333, 334, apparently would define as "racially identifiable" any school where the minority, whether white or black, was less than 30 per cent. The District Court in this proceeding would, in its application of the term "racially identifiable", construe the term as embracing the idea of a "viable racial mix" in the school population, which will not lead to a desegregation of the system. 338 F. Supp. at pp. 194-5. Actually, as Dr. Pettigrew indicated, it would seem the term "racially identifiable" has no fixed definition and, its application, will vary with the circumstances of the particular situation, just as a plan of desegregation itself will vary, since, as the Court said in *Green, supra,* at p. 439, "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case."

[24] That school policy is generally a minimal factor in such situation, see 85 *Har. L. Rev.* 77. In fact, the use of zoning and restrictive covenants as instruments of segregation is far more typical of northern than southern communities. See, McCloskey, *The Modern Supreme Court* (Har., 1972), pp. 109-10:

> "In fact, the maintenance of 'black ghettos' in the cities was north's substitute for the segregation laws of the south * * *.

there was, as the Court later reluctantly recognized, no practical way to achieve a racially balanced mix, whatever plan of desegregation was adopted. With a school population approximately 65 per cent black, it was not possible to avoid having schools that would be heavily black.[25] The constitutional obligation thus could, in that setting, only have as its goal the one stated by the District Court, i.e., "to the extent feasible within the City of Richmond." [26] Indeed, it was the very intractability of the problem of achieving a "viable racial mix" that prompted the Court to suggest in July, 1970, that it might be appropriate for the defendant School Board to discuss with the school officials of the contiguous counties the feasibility of consolidation of the school districts, "all of which may tend to assist them in their obligation".[27]

The Court's finding of obstruction particularly centers on the substitute plan which the School Board proposed on July 23, 1970, in accordance with the Court's previous directive. It found two objections to the plan. The objections are actually part of one problem, i.e., transportation. The first objection was that the plan did not require as much integration in the elementary grades as in the higher grades. Such a difference in treatment, however,

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The President's Committee on Civil Rights reported in 1947 that the amount of land covered by racial restriction in Chicago was as high as 80 per cent and that, according to students of the subject, virtually all new subdivisions are blanketed by these covenants."

[25] Cf., *United States* v. *Choctaw County Board of Education* (D.C. Ala. 1971), 339 F. Supp. 901, 903.

[26] See 325 F. Supp. 835.

[27] See Joint Appendix 74.

the Court found had some support in both *Swann*[28] and *Brewer*.[29] An increase in the desegregation of the elementary grades, however, depended upon the purchase and use of a considerable amount of transportation equipment by the board; and this was the basis of the second criticism that "the School Board had in August (1970) still taken no steps to acquire the necessary equipment." [30] The Court repeated this criticism with reference to the plaintiffs' mid-term motion made in the fall of 1970 for an amendment of defendant's approved interim plan which, for implementation, "required the purchase of transportation facilities which the School Board still would only say it would acquire if so ordered." [31] Yet at the very time when the action of the School Board in failing to buy buses was thus being found to be "unreasonably obdurate", the Court itself was declaring on August 7, 1970, that "it seems to me it would be completely unreasonable to force a school system that has no transportation, and you all don't have any to any great extent, to go out and buy new busses when the United States Supreme Court may say that is wrong." [32] Again, as late as January 29, 1971, the Court, in refusing to order the immediate implementation

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[28] 431 F.2d 138.

[29] In 324 F. Supp. 468, the Court said:

> "Language and holdings in both *Swann* and *Brewer* v. *School Board of City of Norfolk*, 434 F.2d 408 (4th Cir. June 22, 1970), indicate that a school board's duty to desegregate at the secondary level is somewhat more categorical than at the elementary level."

[30] 53 FRD 32.

[31] 53 FRD 32-3.

[32] Joint Appendix 92-3.

of a plan submitted by the plaintiffs, which "would require the acquisition of additional transportation facilities not then available", found that "the possibility that forthcoming rulings (by the Supreme Court)" might make such acquisition unnecessary and a needless expense induced "the Court to decide that immediate reorganization of the Richmond system would be 'unreasonable" under *Swann*." [33] If the Court did not feel it was reasonable in January, 1971, to require the Board to purchase additional buses, it certainly cannot be said that, in the period of uncertainty in 1970, the failure of the School Board to propose such acquisition, justifies any charge of unreasonableness, much less obdurateness or action "in defiance of law" or taken in "bad faith".

The conclusion of the District Court that the Board was "unreasonably obdurate", it seems, was influenced by the feeling, repeated in a number of the Court's opinions, that "Each move (by the Board) in the agonizingly slow process of desegregation has been taken unwillingly and under coercion".[34] The record, as we read it, though, does not indicate that the Board was always halting, certainly not obstructive, in its efforts to discharge its legal duty to desegregate; nor does it seem that the Court itself had always so construed the action of the Board. In June, 1970, the Court remarked, that, while not satisfied "that every reasonable effort has been made to explore" all possible means of improving its plan, it was "satisfied Dr. Little and Mr. Adams (the school administrators) have been working day and night diligently to do the best they

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[33] See, Joint Appendix 132, 134, 135.

[34] 338 F. Supp. 103; see, also, 53 FRD 39.

could, the School Board too." [35] It may be that in the early years after *Brown* the School Board was neglectful of its responsibility, but, beginning in the middle of 1965, it seems to have become more active. Moreover, the promptness and vigor with which the Board adopted and pressed the suggestion of the Court that steps be considered in connection with a possible consolidation of the Richmond schools with those of Chesterfield and Henrico Counties must cast doubt upon any finding that the Board was unwilling to explore any avenue, even one of uncharted legality, in the discharge of its obligation. The Court wrote its letter suggesting a discussion with the other counties looking to such possible consolidation on July 6, 1970. The letter was addressed to the attorneys for the plaintiffs but a copy went to counsel for the School Board. Nothing was done by counsel for the plaintiffs as a result of this letter but on July 23, 1970, the Board moved the Court for leave to make the School Boards of Chesterfield and Henrico Counties parties and to serve on them a third-party complaint wherein consolidation of their school systems with that of the Richmond systems would be required. The Board thereafter took the "laboring oar" in that proceeding. Neither it nor its counsel has been halting in pressing that action, despite substantial local disapproval.[36]

It is clear that the Board, in attempting to develop a unitary school system for Richmond during 1970, was not operating in an area where the practical methods to be used were plainly illuminated or where prior decisions had not left a "lingering doubt" as to the proper pro-

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[35] See, Joint Appendix 92.

[36] See, 338 F. Supp. 67, 100-1.

cedure to be followed.[37] Even the District Court had its uncertainties. All parties were awaiting the decision of the Supreme Court in *Swann*. Before *Swann* was decided, however, the parties were engaged in an attempt to develop a novel method of desegregating the Richmond school system for which there was not at the time legal precedent. Nor can it be said that there was not some remaining confusion, at least at the District level, about the scope of *Swann* itself.[38] The frustrations of the District Court in its commendable attempt to arrive at a school plan that would protect the constitutional rights of the plaintiffs and others in their class, are understandable, but, to some extent, the School Board itself was also frustrated. It seems to un unfair to find under these circumstances that it was unreasonably obdurate.

II.

The District Court enunciated an alternative ground for the award it made. It concluded that school desegregation actions serve the ends of sound public policy as expressed in Congressional acts and are thus actually public

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[37] See, *Local No. 149 I.U., U.A., A. & A.I.W.* v. *American Brake Shoe Co.* (4th Cir. 1962), 298 F.2d 212, 216, cert. den. 369 U.S. 873, 82 S. Ct. 1142, 8 L. Ed. 2d 276.

In *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967), it was stated that "a police officer is not charged with predicting the future course of constitutional law." By like token, it would seem a school board should not be required, under penalty of being charged with obdurateness and being saddled with onerous attorneys' fees, to anticipate or predict the future course of "constitutional law" in the murky area of school desegregation.

[38] See, *Winston-Salem/Forsyth County Board of Education* v. *Scott*, opinion of Chief Justice Burger, dated August 31, 1971, —— U.S. ——.

actions, carried on by "private-attorneys general", who are entitled to be compensated as a part of the costs of the action. Specifically, it held that "exercise of equity power requires the Court to allow counsels' fees and expenses, in a field in which Congress has authorized broad equitable remedies 'unless special circumstances would render such an award unjust.'" [39] Apparently, though, the District Court would limit the application of this alternative ground for the award to those situations where the rights of the plaintiff were plain and the defense manifestly without merit. This conclusion follows from the fact that the Court finds this right of an award only arose in 1970 and 1971, when it might be presumed from previous expressions in the opinion, the Court concluded that all doubts about how to achieve a non-racial unitary school system had been resolved, and any failure of a school system to inaugurate such a system was obviously in bad faith and in defiance of law. That follows from this statement made by way of preface to its exposition of its alternative ground:

> "Passing the question of the appropriateness of allowing fees on the basis of traditional equitable standards, the Court is persuaded that in 1970 and 1971 the character of school desegregation litigation has become such that full and appropriate relief must include the award of expenses of litigation. This is an alternative ground for today's ruling." [40]

If this is the basis for the Court's alternative ground, it really does not differ from the rule that has heretofore

[39] See 53 FRD at p. 42.

[40] See, 53 FRD at p. 41.

been followed consistently by this Court that, where a defendant defends in bad faith or in defiance of law, equity will award attorney's fees. The difficulty with the application of the Court's alternative ground for an award on this basis, though, is its assumption that by 1970 the law on the standards to be applied in achieving a unitary school system had been clearly and finally determined. As we have seen, there was no such certainty in 1970; indeed it would not appear that such certainty exists today. And it is this very uncertainty that is the rationale of the decision in *Kelly* v. *Guinn* (9th Cir. 1972), 456 F.2d 100, 111, where the Court, citing both the District Court's opinion involved in this appeal (53 FRD 28), and *Lee* v. *Southern Home Sites Corp.* (5th Cir. 1970), 429 F.2d 290, 295-296,[41] sustained a denial of attorney's fees in a school integration case, because:

> "First, there was substantial doubt as to the school district's legal obligation in the circumstances of this case; the district's resistance to plaintiffs' demands rested upon that doubt, and not upon an obdurate refusal to implement clear constitutional rights. Second, throughout the proceedings the school district has evinced a willingness to discharge its responsibilities under the law when those duties were made clear."

If, however, an award of attorney's fees is to be made as a means of implementing public policy, as the District Court indicates in its exposition of its alternative ground of award, it must normally find its warrant for such action

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[41] See, also, *Lee* v. *Southern Home Sites Corp.* (5th Cir. 1971), 444 F.2d 143.

in statutory authority.[42] Congress, however, has made no provision for such award in school desegregation cases. Legislation to such effect, included in a bill to assist in the integration of educational institutions, was introduced in 1971 in Congress but it was not favorably considered. Moreover, in the Civil Rights Act of 1964, it expressly provided for such award in both the equal employment opportunity[43] and the public accommodations sections[44] but pointedly omitted to include such a provision in the public education section.[45] In giving effect to this contrast in the several titles of the Civil Rights Act of 1964, and in affirming that any award of attorney's fees in a school desegregation case must be predicated on traditional equitable standards, the Court in *Kemp* v. *Beasley* (8th Cir. 1965), 352 F.2d 14, 23, said:

> "Congress by specifically authorizing attorney's fees in Public Accommodation cases and not making allowance in school segregation cases clearly indicated that insofar as the Civil Rights Act is concerned, it does not authorize the sanction of legal fees in this type of action. The doctrine of *Expressio unium est exclusio alterius* applies here and is dispositive of this contention."

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[42] See *Fleischmann* v. *Maier Brewing Co.* (1967), 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475; see, also, *Brewer* v. *School Board of City of Norfolk, Virginia, supra,* note 22, at p. 950.

[43] See, Section 2000 e-5(k), 42 U.S.C.

[44] See, Section 2000 a-3(b), 42 U.S.C.

[45] Section 2000 c-7, 42 U.S.C.; and see, *United States* v. *Gray* (D.C. R.I. 1970), 319 F. Supp. 871, 872-3. See, however, Note 57, post.

The same conclusion was reached in *Monroe* v. *Board of Com'rs. of City of Jackson, Tenn.* (6th Cir. 1972), 453 F.2d 259, 262-3, note 1, where an award though sustained, was sustained on the ground of "unreasonable, obdurate obstinacy" as enunciated in *Bradley* v. *School Board of Richmond, Virginia* (4th Cir. 1965), 345 F.2d 310, 321, and not as a vehicle for the enforcement of public policy. To the same effect is *United States* v. *Gray, supra.*

It is suggested that *Mills* v. *Electric Auto-Lite* (1970), 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593, and *Lee* v. *Southern Home Sites Corp.* (5th Cir. 1971), 444 F.2d 143, sustain this alternative award as in the nature of a sanction designed to further public policy. Any reliance on *Mills* is "misplaced, however, because conferral of benefits, not policy enforcement, was the *Mills* Court's stated justification for its holding." 50 *Tex. L. Rev.* 207 (1971).[46] In fact, the award in *Mills* was based on the same concept of benefit as was used to support the award in *Trustees* v. *Greenough* (1881), 105 U.S. 527. 36 *Mo. L. Rev.* 137 (1971). Equally inapposite is *Lee.* Though filed under Section 1982, it was like unto, and, so far as relief was concerned, should be treated similarly as an action under Section 3612(c), 42 U.S.C., in which attorney's fees are allowable.[47] By this

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[46] See, also, *Kahan* v. *Rosenstiel* (3d Cir. 1970), 424 F.2d 161, 166:

"In the *Mills* opinion, Justice Harlan noted that the plaintiffs' suit *conferred a benefit* on all the shareholders * * *." (Italics added.)

[47] See, particularly note 2, p. 147, 444 F.2d.

This case has been criticized in 50 *Tex. L. Rev.* 207. Thus, it finds untenable its attempt to identify its award with the statutory authorization provided in Section 3612(c), because, "Under the latter statute (section 3612) the court may not award attorney's fees to a plaintiff financially able to pay his own fees." (Page 208).

reasoning, the Court sought to bring the award within the umbrella of a parallel specific statutory authorization.[48] There is no basis for such a rationale here.

If, however, the rationale of *Mills* is to be stretched so as to provide a vehicle for establishing judicial power justifying the employment of award of attorney's fees to promote and encourage private litigation in support of public policy as expressed by Congress or embodied in the Constitution, it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination, and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general.[49] Counsel in environmental cases would claim such a role for their services.[50] The protection of historical houses and monuments against the encroachment of highways has been cloaked within the mantle of public interest and it would be argued should receive the encouragement of an award.[51] Consumers' suits are

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[48] *Knight* v. *Auciello* (1st Cir. 1972), 453 F.2d 852, is a similar case, involving discrimination proscribed by Section 1982, 42 U.S.C.

[49] See, Note, *The Allocation of Attorney's Fees After Mills* v. *Electric Auto-Lite Co.*, 38 *University of Chicago L. Rev.* 316, at pp. 329-30 (1971).

[50] See, Section 4332(2), et seq., 42 U.S.C.; *Environmental Defense Fund* v. *Corps of Eng. of U. S. Army* (D.C. Ark. 1971), 325 F. Supp. 749; *Environmental Defense Fund, Inc.* v. *Corps of Engineers* (D.C. D.C. 1971), 324 F. Supp. 878; *Businessmen Affected Severely, etc.* v. *D.C. City Council* (D.C. D.C. 1972), 339 F. Supp. 793.

[51] See, Section 461, 16 U.S.C., and Section 4331(b)(4), 42 U.S.C.; *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.* (4th Cir. 1971), 441 F.2d 232; Cf., *Ely* v. *Velde* (D.C. Va. 1971), 321 F. Supp. 1088.

clearly to be considered.[52] Apportionment suits justify awards under this theory.[53] First Amendment rights are often spoken of as preferred constitutional rights. Attacks upon statutes infringing free speech would, under this theory, command an allowance. But it must be emphasized that whether the enforcement of Congressional purpose in all these cases commands an award of attorney's fees is a matter for legislative determination. And Congress has not been reticent in expressing such purpose in those cases where it conceives that such special award is appropriate. In many instances, where Congress has enacted statutes designed to further public purpose, it has bulwarked their enforcement with provisions for the allowance of counsel fees to attorneys for private parties invoking such statutes; in other cases it has denied such awards.[54] In some of the statutes authorizing such allowances, the award is, as in the statute involved in *Newman* v. *Piggie Park Enterprises* (1968), 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263, either mandatory or practically so; in others it is discretionary[55] and the granting of awards is generally made through the use of the same guidelines as motivate courts in making awards under the traditional equity rule. Should the courts, in those in-

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[52] See, 38 *University of Chicago L. Rev.* 316.

[53] Actually, an alternative award has been made in such a case. *Sims* v. *Amos* (3-judge ct. Ala. 1972), —— F. Supp. —— (filed March 17, 1972).

[54] See Annotation, 8 L. Ed. 2d 894, at pp. 922-32, for a listing of statutes authorizing an award of attorney's fees. To this list should be added Section 1640, 15 U.S.C. (Truth-in-Lending Act).

[55] See, for instance, Section 153, 43 U.S.C.; *United Transportation Union* v. *Soo Line RR Co.* (7th Cir. 1972), 457 F.2d 285.

stances where Congress has failed to grant the right, review the legislative omission and sustain or correct the omission as the court's judgment on public policy suggests? This, it seems to us, would be an unwarranted exercise of judicial power. After all, Courts should not assume that Congress legislates in ignorance of existing law, whether statutory or precedential. Accordingly, when Congress omits to provide specially for the allowance of attorney's fees in a statutory scheme designed to further a public purpose, it may be fairly accepted that it did so purposefully, intending that the allowance of attorney's fees in cases brought to enforce the rights there created or recognized should be allowed only as they may be authorized under the traditional and long-established principles as stated in *Sprague* v. *Ticonic Bank* (1939), 307 U.S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184. Such consideration, it would seem, was the compelling reason that prompted one commentator to offer the apt *caveat* that the determination of public policy as a predicate for such awards should be more safely left with Congress and not undertaken by the Courts. Thus, in 50 *Tex. L. Rev.* 209 (1971), it is stated:

> "The decision, (referring to *Lee*) however, sanctions excessive judicial discretion that may emasculate the general rule against fee awards and inject more unpredictability into the judicial process. The legislature should formulate a rule that would promote predictability and utilize the power inherent in fee allocation to pursue the goals it desires to achieve, one of which would be equal access to the courts."

Even the author of the Note, *The Allocation of Attorney's Fees After Mills* v. *Electric Auto-Lite Co.*, 38 *University*

of Chicago L. Rev., 316, though sympathetic to the extension of *Mills* to cover awards of attorney's fees in support of public policy, recognizes that a general policy, applicable to all cases, on the award of attorney's fees should be adopted, concluding its review of the subject with this comment:

> "Logically, one of two things must happen: either judicial discretion to grant fees on policy grounds will result in universal fee shifting from the successful party, or the courts will withdraw to the traditional position, denying any fee transfer without specific statutory authorization. *Mills* represents an uneasy halfway house between these two extremes." (Page 336)

We find ourselves in agreement with the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts.[56] This is especially true in school cases, where the guidelines are murky and where harried, normally uncompensated School Boards must tread warily their way through largely uncharted and shadowy legal forests in their search for an acceptable plan providing what the courts will hopefully decide is a unitary school system.

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[56] It is interesting that in all the cases where the right to make an award for policy reasons has been stated, it has been stated simply as an alternative ground to a finding of unreasonable obduracy. See, 53 FRD at pp. 39-42, and *Lee, supra*, at p. 144. In *Sims, supra*, at p. ——, the Court found that, "The history of the present litigation is replete with instances of the Legislature's neglect of, and even total disregard for, its constitutional obligation to reapportion." In short, no court has yet predicated an award exclusively upon the promotion of public policy.

Accordingly, until Congress authorizes otherwise awards of attorney's fees in school desegregation cases must rest upon the traditional equitable standards as stated in *Bradley* v. *Richmond School Board* (4th Cir. 1965), 345 F.2d 310, which provide ample scope for the award in appropriate cases.

III.

After the above opinion had been prepared but not issued, the Congress enacted Section 718 of the Emergency School Aid Act. The appellees promptly called to the Court's attention this Section, suggesting that it provided an alternative basis for the award made. They construed the reference in the Section to "final order" to embrace any appealable order dealing with any issue raised in a school desegregation case. Any order which had been appealed and was pending on appeal, unresolved, on the effective date of the Section (i.e., July 1, 1972), they argued, could provide a proper vehicle for an award under the Section.[56a]

Since this issue of the application of Section 718 was raised simultaneously in a number of other pending appeals, it was determined to withhold the above opinion for the time being, and to consider *en banc* the reach of

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[56a] During the course of the oral argument counsel for the appellees was asked to define the term "final order" as used in Section 718. His reply was,

> "* * * there is mention of final order in the legislative material—they use that term rather than a final judgment because in recognition of the peculiar nature of school cases,—that is you may have a wave of litigation that would end up in a final decision by this court or the Supreme Court and then the case would again be relitigated later—that order which is appealable is a final order."

Section 718, as applied both to this case and to the other related appeals. Such *en banc* hearing has been had and the Court has concluded that Section 718 does not reach services rendered prior to June 30, 1972.[57]

Were it to be construed as extending to any "final order", entered as "necessary to secure compliance", and pending unresolved on the effective date of the Act (which is the plaintiffs' construction of the sweep of the Section), such Section could not be used as a vehicle to validate this award. This is so because there was no "final order" pending unresolved on appeal on June 30, 1972, to which this award could attach. The only proceeding pending unresolved in this case on May 26, 1971, when the District Court issued its order allowing attorney's fees, was the action begun on motion of the School Board itself to require the merger of the Richmond schools with those of the contiguous counties of Chesterfield and Henrico. All orders issued prior to that date in this desegregation action had long since become final and were not pending on appeal either on May 26 or on the date Section 718 became effective. Thus, on August 17, 1970, the District Court had approved the School Board's interim plan for the school year 1970-1. There was no appeal perfected from that order. The plaintiffs had moved on December 9, 1970 for additional relief but that motion had been denied by an order dated January 29, 1970, which, incidentally, was the same date used by the District Court for the cut-off of its allowance of attorney's fees. Again, there was no

[57] *James* v. *The Beaufort County Board of Education* (72-1065); *Copeland, et al.* v. *School Board of the City of Portsmouth, Virginia, et al.* (Nos. 71-1993 and 71-1994); *Thompson* v. *The School Board of the City of Newport News, Virginia, et al.* (Nos. 71-2032 and 71-2033), filed October ——, 1972.

appeal from that order dismissing plaintiffs' application for relief, and, even if it be assumed that plaintiffs' attorneys are to be granted attorneys' fees when they do not prevail (an assumption clearly not permitted under the language of Section 718), the proceeding under which that order was entered was not pending when Section 718 became effective.[58] To restate: The only proceedings pending undetermined by an order that had not become final on the date Section 718 became effective was the action begun by the School Board and resulting in the order of the District Court dated January 10, 1972.[59] That order, which, it may be assumed, is still pending since the School Board is presently seeking certiorari, was reversed by this Court[60] and, unless the decision of this Court is in turn reversed, it will not support any allowance of attorneys' fees, since Section 718 authorizes allowance only when plaintiffs have prevailed.

REVERSED.

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[58] It is true that on January 29, 1971, the School Board submitted to the District Court its proposed plan for the operation of the Richmond schools for the school year 1971-2. There seems to have been either no dispute over this plan or the proposal was swallowed up in the more expansive merger action.

[59] 338 F. Supp. 67.

[60] 462 F.2d 1058.

WINTER, *Circuit Judge,* dissenting:

The in banc court holds that this case is not governed by § 718 of Title VII, "Emergency School Aid Act," of the Education Amendments of 1972. P.L. 92-318; 86 Stat. 235; 1972 U.S. Code and Admin. News 1908, 2051. The panel concludes both that the Richmond School Board was not guilty of "unreasonable, obdurate obstinacy" and that plaintiffs were not entitled to recover counsel fees under the private attorney general concept. On all issues, I would conclude otherwise and I therefore respectfully dissent.

I.

Because I conclude not only that § 718 is applicable to this litigation, but also that, as a matter of statutory construction, its terms are met, I place my dissent from the panel's decision primarily on that ground. If, however, § 718 is treated as inapplicable to this case, I would affirm the district court, preferably on my concurring views in *Brewer* v. *School Board of City of Norfolk, Virginia,* 456 F.2d 943, 952-54 (4 Cir. 1972) cert. den. —— U.S. —— (1972). Even if the obdurate obstinacy test controls, I would still affirm. As I read the record, I can only conclude that for the period for which an allowance of fees was made, the Richmond School Board was obdurately obstinate. Commendably, it seized the initiative in vindicating plaintiffs' rights by seeking to sustain a consolidation of school districts; but this was a latter-day conversion that occurred after the district court suggested that consolidation be explored. Until that time the record reflects the Board's stubborn reluctance to implement Brown I (Brown v. Board of Education, 347 U.S. 483 (1954) in the light of Green v. County School Board of New Kent

County, Va., 391 U.S. 430 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969); and, while the litigation was progressing, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The history of the litigation, as set forth in the opinion of the district court, is sufficient to prove the point. Bradley v. School Board of City of Richmond, Virginia, 53 F.R.D. 28, 29-33 (E.D. Va. 1971).

II.

I turn to the more important questions of the scope and application of § 718. Neither in the instant case, nor in James v. The Beaufort County Board of Education, —— F.2d —— (4 Cir. decided simultaneously herewith), does the majority articulate in other than summary form why § 718 should not apply to cases pending on its effective date (July 1, 1972). I conclude that it does apply, and in the face of the majority's silence, I must discuss the pertinent authorities at some length.

The text of § 178 is set forth in the margin.[1] Its enactment presents no question of retroactive application to this

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Attorney Fees

[1] Sec. 718. Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

litigation. As I shall show, the issue of the allowance of counsel fees has been an issue throughout every stage of the proceedings; and the proceedings were not terminated when § 718 became effective on July 1, 1972, because this appeal was pending before us. This is not a case where a subsequent statute is sought to be applied to events long past and to issues long finally decided. Rather, it is a case which presents the concurrent application of a statute to an issue still in the process of litigation at the time of its enactment. United States v. Schooner Peggy, 1 Cranch 103 (1801), and Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969), are the significant controlling authorities.

In *Peggy,* while an appeal was pending from a decision of the lower court in a prize case, the United States entered into a treaty with France, which if applicable would have required reversal. The treaty explicitly contemplated that it would be applicable to seizures that had taken place prior to the treaty's ratification where litigation had not been terminated prior to ratification. On the basis of the new treaty, the Supreme Court reversed the decision of the lower court. In the opinion of Mr. Justice Marshall, it was said:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction

> which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction confirming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

United States v. Schooner Peggy, supra, 1 Cranch at 109.

Peggy may be interpreted in two ways: Under a narrow interpretation the Court held only that, where the law changes between the decision of the lower court and an appeal, the appellate court must apply the new law if, by its terms, it purports to be applicable to pending cases. The decisional process, under this interpretation, requires the appellate court to examine the intervening law and to determine whether it was intended to apply to factual situations which transpired prior to the law's enactment. Since the treaty in *Peggy* explicitly applied to situations where the controversy was still pending, it followed that the statute should be applied in deciding the case. Certainly the facts of *Peggy* and much of the language of the opinion of Mr. Justice Marshall support this interpretation.

By a broader interpretation, *Peggy* may be considered to hold that where the law has changed between the occurrence of the facts in issue and the decision of the appel-

late court and where the controversy is still pending, the appellate court must apply the new law, unless there is a positive expression that the new law is not to apply to pending cases. This is the interpretation of *Peggy* which found its final expression in *Thorpe*. But before turning to *Thorpe* it is well to consider intervening decisions.

In Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941), the Court held that a federal appellate court in exercising diversity jurisdiction must follow a state court decision which was subsequent to and contradicted the district court decision. In Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940), the Court held that the appellate court must apply an intervening federal statute where the case is pending on appeal. However, in *Carpenter*, the statute explicitly indicated that it was to apply to pending cases. In United States v. Chambers, 291 U.S. 217 (1934), the Court held that indictments returned pursuant to the eighteenth amendment, and before the adoption of the twenty-first amendment, must be dismissed after passage of the twenty first amendment even though the acts when committed were crimes. See also Ziffrin v. United States, 318 U.S. 73 (1943). Then, in Linkletter v. Walker, 381 U.S. 618 (1965), the Court drew a firm distinction between those cases where an appeal is still pending and those that are final ("where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . .," 381 U.S. at 622, n. 5). The Court held that Mapp v. Ohio, 367 U.S. 643 (1961), applied to pending cases but not to final cases. It discussed the previous decisions to which reference has been made and concluded that "[u]nder our cases . . . a change in law will be given effect while a case is on direct review.

. . . " 381 U.S. at 627. It should be noted, however, that the Court was by no means consistent in applying this rule after *Linkletter*. See Desist v. United States, 394 U.S. 244, 256-60 (1969) (Harlan, J., dissenting).

In *Thorpe*, the Housing Authority gave the tenant notice to vacate in August, 1965, but refused to give its reasons for the notice. When the tenant refused to vacate, the Authority brought an action for summary eviction in September, 1965, and prevailed. Actual eviction, however, was stayed during the pendency of the litigation. In 1967, before the Supreme Court decided the case, the Department of Housing and Urban Development issued a circular directing that tenants must be given reasons for their eviction. The Supreme Court held that housing authorities must apply the HUD circular "before evicting any tenant still residing in such projects on the date of this decision." 393 U.S. at 274. Relying on *Peggy*, it explained that "[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision," although it recognized that "[e]xceptions have been made to prevent manifest injustice. . . ." 393 U.S. at 281-82.

The difference between *Thorpe* and *Peggy* is that the HUD circular did not indicate that it was to be applied to pending cases or to facts which had transpired prior to its issuance. Indeed, the circular stated that it was to apply "from this date" (the date of issuance). 393 U.S. at 272, n. 8. Thus, *Thorpe* held that even where the intervening law does not explicitly or implicitly contemplate that it would be applied to pending cases, it, nevertheless, must be applied at the appellate level to decide the case. The line of cases from *Peggy* to *Thorpe* dictates the application of § 718 in the instant case, irrespective of legis-

lative intent. Simply stated, since the law changed while the case (the lawyers' fees issue) was still pending before us, the new law applies.

The School Board contends that *Thorpe* does not erase the long-standing rule of construction favoring prospective application. It argues that *Thorpe* did not present a retroactivity question since the tenant had not yet been evicted. It places great reliance on the "tenant still residing" language in the opinion. The School Board concludes that since the tenant had not yet been evicted, the HUD circular was not retroactively applied but was currently applied to a still pending eviction. With respect to the legal services in issue in the instant case, the Board argues that the *Thorpe* rule does not apply since the performance of legal services was a completed act prior to the effective date of § 718.

While the Board's premise regarding the interpretation of *Thorpe* may not be faulted, its analogy is inapt and its conclusion incorrect. True, the rendition of legal services in the instant case had been completed (except for legal services on appeal), but the dispute over who was liable for payment was very much alive, as alive as the dispute over eviction in *Thorpe*. The proper analogy is not between rendition of legal services and the eviction litigation, but between rendition of legal services and the Housing Authority's termination of the lease and notice to vacate. These are the completed acts. What lingers is the dispute over who is right, and it lingers in both cases. Therefore, as in *Thorpe*, here there is no retroactivity issue. *Thorpe* governs and § 718 applies unless it is rendered inapplicable because one or more of its provisions has not been

met. See Bassett v. Atlanta Independent School Dist. No. 1550 (E.D. Tex. August 28, 1972).[3]

III.

Since *Thorpe* governs, legislative history is not relevant, unless it unequivocally shows an intention on the part of Congress that the statute not apply to live issues in currently pending cases. The legislative history of § 718 provides no such expression of intent. To the extent that it proves anything, it supports the conclusion that § 718 should apply to live issues in currently pending cases.

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[3] It must be recognized that there are some discordant notes in the case law: In Soria v. Oxnard School Dist. Board, —— F.2d —— (9 Cir. August 21, 1972), it was held, in a per curiam opinion, that § 803 of the Education Amendments of 1972, which postponed the effectiveness of busing orders for the purpose of achieving racial balance until all appeals have been exhausted, had no application to a case pending at the time of its effective date in which busing, pursuant to an integration plan, is already in operation. There is no mention, however, of *Thorpe*.

In Greene v. United States, 376 U.S. 149 (1964), the Court refused to apply an intervening Department of Defense regulation to a pending case, reasoning in retroactivity language. But this case was obviously one where "retroactivity" would work "manifest injustice." See *Thorpe*, *supra* at 282 n. 43. Cases construing the Criminal Justice Act, 18 U.S.C.A. § 3006A (1970), which provides court-appointed attorneys with fees from federal funds have held that it applies only where counsel was appointed after the Act, or at least, only where counsel's assistance was rendered after the Act. Compare United States v. Pope, 251 F.S. 331 (D. Neb. 1966) with United States v. Dutsch, 357 F.2d 331 (4 Cir. 1966)); United States v. Thompson, 356 F.2d 216 (2 Cir. 1965) cert. den. 384 U.S. 964 (1966); Dolan v. United States, 351 F.2d 671 (5 Cir. 1965) (per curiam). But that Act involved expenditures of federal appropriations which, by the terms of the Act, would not become effective until a year after enactment, so that it may be fairly said that there was a clear legislative intention not to make the terms of the Act applicable to pending cases.

Two clauses of § 718 bear on the issue. As originally proposed and reported, § 718 provided for a federal fund of $15 million from which counsel would be paid "for services rendered, and the costs incurred, after the date of enactment . . ." S. 683, § 11 (Quality Integrated Education Act). The Senate Committee on Labor and Public Welfare reported the bill, with this clause intact, as § 1557. Sen. Rep. No. 92-61. 92nd Cong. 1st Sess. pp. 55-56.

The School Board places great stress on this language as indicating a strictly prospective legislative intent. It fails to point out, however, that the federal funding, as well as the "after the date" clause, were deleted by floor amendment prior to the passage of the Act. This floor amendment can be construed to indicate that Congress' ultimate intent was indeed the opposite of that urged by the Board. The "after the date" clause and federal funding seem to have gone in tandem. Given the nature of federal appropriation, prospective application would be a sensible requirement. Compare Criminal Justice Act, 18 U.S.C.A. § 3006A (1970). By the deletion of federal funding, the reason for restricting payment of attorneys' fees for services performed after the date of enactment disappeared.

Secondly, the School Board points to the language in the committee report which refers to "additional efforts," but the sentence is phrased in the conjunctive. It reads: "$15 million is set aside *for additional efforts* under this bill and under Title I of the Elementary and Secondary Education Act of 1965 * * * *and for* vigorous nation-wide enforcement of constitutional and statutory protection against all forms of discrimination" (emphasis added). Whether "additonal efforts" modifies everything that follows, or

just what precedes the conjunction "and", is debatable and a rather unenlightening inquiry.

Thus, nothing on the face of § 718, or in its legislative history, conclusively manifests a congressional desire that the *Thorpe* rule applying new legislation to live issues in pending litigation should not prevail. I turn to the question of its precise application.

IV.

Section 718 empowers the court to award counsel fees "in its discretion, upon a finding that the proceedings were necessary to bring about compliance. . . ." The private attorney general rule of Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), governs the court's discretion. Under the *Piggie Park* standard, the court should award counsel fees "unless special circumstances would render such an award unjust." 390 U.S. at 402. See Lea v. Cone Mills Corp., 438 F.2d 86 (4 Cir. 1971). The language of § 718 is substantially similar to the counsel fee provisions in § 204(b) of Title II and § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a-3(b), 2000e-5(k), and § 812(c) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. § 3612(c), all of which are governed by *Piggie Park*. Moreover, the legislative history of § 718 reveals that its purpose is the same as the counsel fee provisions in Titles II, VII, and VIII. 117 Cong. Rec. S. 5484, 5490 (Daily Ed. April 22, 1921); *id.* S. 5537 (Daily Ed. April 23, 1971). The additional standard in § 718 requiring the court to find that the suit was necessary to bring about compliance does not modify the *Piggie Park* standard, because its purpose, as revealed by the legislative history, is to deter champertous

claims and the unnecesary protraction of litigation. 117 Cong. Rec. S. 5485, 5490-91 (Daily Ed. April 22, 1971). In the instant case, the district court found that suit was necessary to bring about compliance and it also found, at least implicitly, that there were no exceptional circumstances which would render an award of counsel fees against the School Board unjust. These findings are not clearly erroneous and hence counsel are entitled to some allowance of fees under § 718 as construed by *Piggie Park.*

V.

Although § 718 should be applied to legal services, whenever rendered, in connection with school litigation culminating in an order entered after its effective date (July 1, 1972), § 718 will not support affirmance of the precise award made by the district court in this case. It would, however, support a larger award to compensate for legal services rendered over a longer period.

The district court's award was for legal services rendered from March 10, 1970, the date when plaintiff filed a motion for further relief because of the decisions in *New Kent County,* supra, *Alexander,* supra, and *Carter,* supra, to January 29, 1971, the date on which the district court declined to implement plaintiff's plan. Manifestly, the entry of that order cannot support an award of counsel fees for services to the date of its entry because the order did not grant relief to the parties seeking to recover fees—a condition precedent to the award of fees as set forth in § 718. But, a recitation of the history of the litigation shows that counsel fees should be awarded for all legal services rendered from March 10, 1970 to April 5, 1971, the date on which the district court entered an order

approving the plan under which the Richmond schools are presently being operated, and thereafter for legal services rendered in this appeal.

The essential dates in the history of the litigation follow: The motion for further relief was filed March 10, 1970. Appended thereto was an application for an award of reasonable attorneys' fees. After admitting that its schools were not then being constitutionally operated, the Board filed a plan (Plan 1) to bring the operation of the schools into compliance with the Constitution. After hearings, the district court disapproved Plan 1 (June 26, 1970) and directed the preparation and filing of a new plan. Plan 2 was filed July 23, 1970, and hearings were held on it. It, too, was disapproved as an inadequate long-range solution. But, because there was insufficient time to prepare, file and consider another plan before the beginning of the next school term, Plan 2 was ordered into effect on August 17, 1970, for the term commencing August 30, 1970, and the Board was also ordered to make a new submission. The Board appealed from the order implementing Plan 2 and obtained a delay in briefing from this court. The appeal was never heard, because, having been effectively stayed, it was rendered moot by later orders. Before Plan 3 was filed, plaintiffs sought further relief for the second semester of the 1970-71 school year, but Plan 3 was filed (January 15, 1971) before they could be heard and their motion was denied on January 29, 1971, the terminal date for the allowance of compensation in the order appealed from. Plan 3 contained three parts—it was a restatement of Plans 1 and 2, and it contained a new third proposal. The Board urged the adoption of the Plan 2 aspect of Plan 3; but, on April 5, 1971, the district court ordered

into effect for the 1971-72 school year the new third proposal. This is the plan under which the Richmond schools are presently operating.[3]

To this summary there need only be added that on August 17, 1970, the district court ordered the parties to confer on the subject of counsel fees. Plaintiffs filed on March 5, 1971, a memorandum in support of their request for an allowance; the court, on March 10, 1971, ordered that further memoranda and evidentiary materials with regard to the motion for counsel fees be filed; and these were filed on March 15, 1971. The order directing the payment of counsel fees was entered May 26, 1971, after the entry of the order approving and implementing Plan 3.

The majority concludes that § 718 was rendered inapplicable because the order appealed from was entered May 26, 1971, a date on which there was no "final order" entered as "necessary to secure compliance." This conclusion seems to me to be overly technical and not in accord with the facts.

The request for counsel fees was made when the motion for additional relief was filed on March 10, 1970. While very much alive throughout the proceedings, properly, the motion was not considered until the district court could approve a plan for a unitary system of schools for Richmond which was other than an interim plan. That approval was forthcoming on April 5, 1971, and promptly thereafter the district court addressed itself to the question of

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[3] Of course, there were even still further proceedings culminating in an order to consolidate the Richmond, Henrico County and Chesterfield School Districts, but this court set that order aside in Bradley v. The School Board of the City of Richmond, Virginia, —— F.2d —— (4 Cir. June 5, 1972), application for cert. filed October —, 1972.

allowance of counsel fees. The approval of a permanent plan was not easily arrived at. Because the proposals of the Richmond School Board were constitutionally unacceptable, except on an interim basis, this approval was arrived at in several steps: (a) disapproval of Plan 1, (b) interim approval of Plan 2, (c) disapproval of additional interim relief, and (d) approval of Plan 3.

Certainly, § 718 is not to be so strictly construed that any counsel fees allowable thereunder must be allowed the very instant that an order granting interim or permanent relief is entered. A request for fees may present difficult questions of fact and require the taking of evidence. The burden of deciding these questions should not be added to the simultaneous burden of deciding the often very complex question of what is a constitutionally acceptable desegregation plan; rather, the issues should be severed and the question of counsel fees decided later so long as the issue of counsel fees had been present throughout the litigation and has not been raised as an afterthought after the school desegregation plan has become final. These practical considerations, plus the fact that every stage in the proceedings has been a part of an overall transition from unconstitutionally operated schools in Richmond to constitutionally operated schools, lead me to the conclusion that the exact terms and conditions of § 718 have in the main been met.

While I therefore conclude that there was a sufficient nexus between the request for counsel fees and the entry of a final order necessary to obtain compliance with the Constitution so as to warrant invoking § 718, I think that § 718 requires that the district court redetermine the allowance. As previously stated, the district court made an

allowance for services to the date that plaintiffs' request for additional interim relief was denied. If the various steps for arriving at an overall desegregation plan for Richmond are severed, § 718 would not permit an allowance for services leading to the order of January 29, 1971, since on that date plaintiffs were denied the additional interim relief they prayed and § 718 permits an allowance only to the prevailing party. However, plaintiffs would be entitled to an allowance for services beyond January 29, 1971, up to April 5, 1971, the date of approval of Plan 3, because on that date they became the prevailing party and they obtained an order, still in effect, which required the schools of Richmond to be operated agreeably to the Constitution. I would therefore vacate the judgment and remand the case for a redetermination of the amount of the allowance—in short, I would require that counsel be compensated for their services to and including April 5, 1971 and also their services on appeal in this case.

Opinion of United States Court of Appeals in *Thompson* Action

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 71-2032 and 71-2033

FRANK V. THOMPSON, *et al.*,

Appellants,

v.

SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, *et al.*,

Appellees.

Nos. 71-1993 and 71-1994

MICHAEL COPELAND, *et al.*,

Appellants,

v.

SCHOOL BOARD OF THE CITY OF PORTSMOUTH, *et al.*,

Appellees.

No. 72-1065

NATHANIEL JAMES, *et al.*,

Appellees,

v.

BEAUFORT COUNTY BOARD OF EDUCATION,

Appellant.

(Decided November 29, 1972)

Opinion of United States Court of Appeals in Thompson Action

Before

HAYNSWORTH, *Chief Judge,*
WINTER, CRAVEN, BUTZNER, RUSSELL and FIELD,
Circuit Judges, sitting en banc.

PER CURIAM:

We ordered *en banc* consideration of lawyer fee claims in these school cases to consider the extent of the applicability of § 718 of the Emergency School Aid Act of 1972. In the City of Portsmouth and the Beaufort County cases, however, apparently adequate fees are allowable on other bases. The precise extent of the reach of § 718 in those cases, therefore, now appears academic.

In the Newport News case, most of the legal services are yet to be rendered, and we are unanimously of the view that, if relief is granted, fees will be allowable under § 718 for those future services. The division within the Court as to the application of § 718 will have some bearing upon any ultimate allowance of fees in that case, though less than was supposed when reargument was requested.

The Court is unanimously of the view that it should apply § 718 to any case pending before it after the Section's enactment. This is consistent with the principle of *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, most recently enunciated in the Supreme Court in *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268.

A majority of the Court, however, is of the view that only legal services rendered after the effective date of § 718 are compensable under it. Those members of the Court invoke the principle that legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute applied in that manner. They do not find such an intention

from the omission of a provision in an earlier draft expressly limiting its application to services rendered after its enactment, when the earlier draft was extensively revised and there is no affirmative expression by any member of Congress of an intention that it should be applied to services rendered prior to its enactment.

A minority of the Court would apply § 718 to legal services, whenever rendered, in connection with school litigation culminating in an order entered after June 30, 1972. In their view, someone must pay the fee, and a statutory placement of the burden of payment on school boards is not a retroactive application of the statute, though some of the services may have been rendered before its enactment as long as an order awarding relief, the fruit of the services, is entered afterwards.

The cases will be remanded for such further proceedings in the District Court as may be necessary in accordance with the views of the majority, applying § 718, when it may otherwise be applicable, only to services rendered after June 30, 1972.*

In the *Portsmouth* case, the District Court will award reasonable attorneys' fees on the principle of *Brewer* v. *The School Board of the City of Norfolk,* 4 Cir., 456 F.2d 943 (1972). In the *Beaufort County* case, the award heretofore made by the District Court is approved.

Remanded.

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* In the *Newport News* case, on a completely different basis, the District Court made an award of attorneys' fees of $750.00 in connection with services and events occurring before June 30, 1972. Since that award was not dependent upon § 718, nothing we say here should be construed to disturb it.

Opinion of United States Court of Appeals in Thompson Action

WINTER, *Circuit Judge*, concurring specially:

I concur in the judgment of the court to the extent that it directs the allowance of attorneys fees in the *City of Portsmouth, Beaufort County* and *Newport News* cases. For the reasons set forth in my separate opinion in Bradley v. School Board of Richmond, —— F.2d —— (4 Cir., No. 71-1774, decided), I would direct the allowance in all three cases on the basis that § 718 of the Emergency School Aid Act of 1972 applies to legal services rendered before the effective date of that enactment in cases pending on that date.